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# DE FACTO CONFRONTATION RIGHTS IN SEXUAL MISCONDUCT DISENROLLMENTS

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*The United States' military and higher education system are two major institutions charged with administratively deciding whether sexual misconduct among its members occurred and, if so, the appropriate corresponding sanctions. Severance of membership, or disenrollment, is a common consequence. Administrative disenrollments for sexual misconduct at military service academies exhibit characteristics of both military administrative discharges and college campus formal grievances under Title IX. But, service academies appear to go a step further in practice by implicitly requiring testimony and submission to cross-examination in order to pursue sexual misconduct disenrollment. While disenrollment of a cadet or midshipman from a service academy carries significant consequences for the alleged offender, administrative hearings are not criminal trials and should not extend the constitutional right to confrontation by default. While the past decade has seen a growing trend at civilian universities towards importing criminal trial requirements in Title IX proceedings, particularly live cross-examination of victims, a closer examination of the relevant judicial opinions reveals the need for live victim testimony is limited to a narrow field of circumstances, not all Title IX grievances. This Article examines the administrative rules for live victim testimony applicable to the military, college campuses, and service academy administrative hearings for sexual misconduct, ultimately concluding that requiring live victim testimony and cross-examination is neither legally necessary nor advisable as a matter of policy. The current practice trends at military*

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*academies to not pursue sexual misconduct discharges without live victim confrontation may cause undue harm to victims and discourage reporting. Service academies can ensure fair hearings and protect due process rights through existing procedural safeguards without granting confrontation to offenders. The authors recommend that service academies reconsider practices of not pursuing discharge actions without live victim testimony for sexual misconduct cases and instead apply existing administrative regulations extending flexibility to pursue discharge without live testimony and cross-examination.*



## INTRODUCTION

The military and postsecondary education have a key role in common. Both are institutions responsible for fielding allegations of sexual assault and harassment, administratively determining when its members committed sexual assault or harassment and meting appropriate administrative consequences. Despite this common role, both systems have

different ways of addressing administrative cases, specifically whether a determination of responsibility can be made without the victim[1] being subjected to cross-examination.

Military service academies in the United States are a hybrid of these two entities; they are simultaneously postsecondary institutions and military units.[2] This Article examines the constitutional, statutory, and regulatory rules applicable to service academy administrative hearings for sexual misconduct, particularly regarding live victim testimony. Ultimately, the authors find that the risk-averse practice of requiring live victim testimony, and thus cross-examination, to disenroll a cadet or midshipman accused of sexual misconduct is unnecessary. Even more, the practice is antithetical to reducing the prevalence of sexual misconduct at the service academies—a goal that has evaded the academies for decades.

The nation's military academies have experienced multiple sexual assault "scandals" grabbing national attention over the past two decades. In 2003, the United States Air Force Academy's sexual assault scandal—marked by the revelation of high prevalence of sexual misconduct and case mishandling—shocked the conscience of the nation.[3] The revelation that sexual assault had been a major problem at the Academy throughout the last decade and possibly since women were first admitted in 1976[4] was jarring considering the institution's selectivity and mission of graduating military leaders of character. A sexual assault case in 2013 at the United States Naval Academy drew fierce public outcry when a female midshipmen alleged that three Naval Academy football players

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[1] The term "victim" is used in this context for clarity. Synonyms include "survivor," "complainant," "complaining witness," "accuser," and "person harmed," among others. Similarly, the term "offender" is meant synonymously with "accused," "respondent," and "person responsible for harm," among other terms. The authors use each of these terms throughout the Article based on context, but all are meant to be pre-adjudicative and not to imply that the person accused is without a presumption of innocence.

[2] The term "military service academy" (or "MSA") technically refers to three institutions: the United States Military Academy at West Point, the United States Naval Academy, and the United States Air Force Academy. Additionally, while technically not "military service academies," the authors are including the United States Coast Guard Academy and the United States Merchant Marine Academy within the term due to their similarity in purpose, structure, and design with regard to the issue of sexual misconduct discharges.

[3] *See, e.g.*, Clara Bingham, *Code of Dishonor*, VANITY FAIR (Nov. 6, 2006), https://www.vanityfair.com/news/2003/12/airforce200312 [https://perma.cc/CF8H-FEM4]; Eric Schmitt & Michael Moss, *Air Force Academy Investigated 54 Sexual Assaults in 10 Years*, N.Y. TIMES (Mar. 7, 2003), https://www.nytimes.com/2003/03/07/us/air-force-academy-investigated-54-sexual-assaults-in-10-years.html [perma.cc/V8PT-ZDBP]; Dan Boyce, *20 Years After a National Scandal, the U.S. Air Force Academy is Still Dealing with Rising Sexual Assault Rates*, COLO. PUB. RADIO NEWS (Mar. 24, 2003), https://www.cpr.org/2023/03/24/us-air-force-academy-sexual-assault-response [https://perma.cc/FH9L-S2G9].

[4] FINAL REPORT OF THE PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY 2 (2003), https://commdocs.house.gov/committees/security/has267270.000/has267270_0f.htm [https://perma.cc/JSD6-YHMV].

sexually assaulted her when she was too intoxicated to consent.[5] At a pre-trial hearing, the victim endured more than twenty hours of cross-examination, at times degrading, prompting Congress to change the criminal preliminary hearing process to protect future alleged victims of sexual assault from grueling cross-examination prior to a criminal trial.[6] In 2021, an anonymous posting by "Midshipman X," a United States Merchant Marine Academy midshipman who reported being raped aboard a Maersk vessel during "Sea Year," caused a stand-down of sea year and major ripples across the maritime industry.[7]

Many reforms have been implemented at the service academies over the years with the goal of appropriately responding to and preventing sexual assault.[8] Unfortunately, prevalence at the service academies remains unacceptably high[9] and tracks sexual assault trends among young adults on college campuses.[10] Inappropriate responsiveness or mishandling by an institution charged with protection and adjudication of its own membership erodes trust in the institution and exacerbates the underlying harm to individuals.[11] Thus, it is critical for service academies to implement policies that do not unnecessarily exact harm

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[5] Annys Shin, *Naval Academy Sexual Assault Allegations Change the Lives of Four Midshipmen*, WASH. POST (May 5, 2014), https://www.washingtonpost.com/local/naval-academy-sexual-assault-allegations-change-the-lives-of-four-midshipmen/2014/05/04/b932b358-ccba-11e3-a75e-463587891b57_story.html [https://perma.cc/UU2T-7BBT].

[6] *Id.*

[7] Blake Ellis & Melanie Hicken, *Culture of Fear at Merchant Marine Academy Silences Students Who Say They Were Sexually Harassed and Assaulted*, CNN (Feb. 16, 2022), https://www.cnn.com/2022/02/16/us/merchant-marine-academy-usmma-sexual-assault-rape-invs/index.html [https://perma.cc/B6QC-V3RB].

[8] Reforms include the founding of the Sexual Assault Prevention and Response (SAPR) program, the creation of multiple confidential reporting avenues for victims of sexual assault, and the establishment of 24-hour victim advocacy programs. For an accounting of Department of Defense initiatives from 2003 to 2005 in response to the revelation of sexual assault at the three military service academies, see ANITA R. LANCASTER, ALAN M. JONES & RACHEL N. LIPARI, DEF. MANPOWER DATA CTR., U.S. DEPARTMENT OF DEFENSE INITIATIVE RELATED TO SEXUAL HARASSMENT AND SEXUAL ASSAULT (2005), https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=8194a46cc145d7c6cb162fd6dc1c40bfa9c4394c [https://perma.cc/C487-J9PY].

[9] U.S. DEP'T OF DEFENSE, ANNUAL REPORT ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES: ACADEMIC PROGRAM YEAR 2022–2023 3–4 (2024), https://www.sapr.mil/sites/default/files/public/docs/reports/MSA/APY22-23/APY22-23_Annual_Report_On_Sexual_Harassment_Violence_at_MSAs.pdf [https://perma.cc/47J9-TR64] (citing the 2022 Service Academy Gender Relations Survey finding an estimated 21.4 percent of academy women and 4.4 percent of academy men experienced unwanted sexual contact in the year prior to being surveyed).

[10] David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, ASS'N OF AM. UNIVS. 19 (2019), https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015 [https://perma.cc/7Y6J-K9EU] (stating that, among undergraduates, 25.5 percent of women and 7.9 percent of men reported nonconsensual sexual contact by physical force or inability to consent since entering the school).

[11] *See, e.g.*, Carly Smith & Jennifer Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 1, 119–24 (Feb. 2013).

on those who report sexual misconduct, or those faced with the choice of whether to report it.

The nature of sexual assault often makes it difficult to secure criminal convictions.[12] Criminal convictions require proof beyond a reasonable doubt,[13] the highest burden of proof in the American legal system.[14] Sexual assault often occurs in private settings and involves describing intimate, private, or embarrassing events.[15] Alcohol is involved in many cases, which affects witness memory and cognition.[16] Trauma also impacts memory and testimony.[17] Cases might result in acquittal or never get prosecuted at all because of evidentiary issues or an unwillingness of the victim to engage in criminal litigation's adversarial process.[18] But, administrative adjudication does not need to carry the same adversarial characteristics as criminal trial.[19]

In the military, at military service academies, and on civilian college campuses, administrative disciplinary hearings should appropriately respond to allegations of sexual misconduct without importing the formal strictures of criminal trials. Administrative hearings are designed to adjudicate the evidence and decide non-criminal penalties such as continued campus enrollment, continued employment, or military service characterization.[20] To a lesser degree than criminal cases, administrative processes also serve a secondary function of seeking retribution and protecting communities from offenders.[21] As a result, administrative processes sometimes function as an alternative, or supplement, to prosecution.[22] However, their consequential exposure for respondents

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12 Cynthia V. Ward, *Trauma and Memory in the Prosecution of Sexual Assault*, 45 L. & PSYCH REV. 87, 98 (2021).

13 *See id.*

14 *See id.*

15 *See*, *e.g.*, Cantor et al., *supra* note 10, at Tables 17, 18 (indicating that college survey respondents reported sexual assault occurred by one offender between 73.8 percent and 87.3 percent of the time depending on gender; between 41.9 percent and 68.3 percent of incidents occurred in a dormitory room, fraternity house, or other residential housing, depending on gender).

16 *See*, *e.g.*, Cantor et al., *supra* note 10, at 31 (describing that 54 percent of women who reported that they did not contact a program or resource following a sexual assault did not do so because alcohol or drugs were involved); *see also* Aaron M. White, *What Happened? Alcohol, Memory Blackouts, and the Brain*, 27 ALCOHOL RES. HEALTH 186 (2003).

17 Ward, *supra* note 12, at 88.

18 *See* Claire Gordon, *Why College Rape Victims Don't Go to the Police*, AL JAZEERA AM. (May 19, 2014), http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/5/19/why-college-rapevictimsdonatgotothepolice.html [https://perma.cc/HC6R-BDGE].

19 *See* Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform,* 125 YALE L.J. 7 (2016).

20 *See* Gordon, *supra* note 18.

21 For example, a college disenrollment for sexual misconduct may follow the student and negatively affect their ability to enroll at a different college. Similarly, an unfavorable military discharge for sexual misconduct often carries additional consequences for future employment, college applications, benefits, and jobs.

22 *See* Gordon, *supra* note 18.

pales in comparison to criminal conviction, imprisonment, and lifetime sex offender registration.

Administrative hearings, including those for sexual misconduct, should not be bound by the same strict procedural rules as criminal trials. Administrative adjudication has a lower standard of proof,[23] does not apply strict evidentiary rules,[24] and the constitutional right to confrontation does not attach.[25] However, trends in postsecondary education under Title IX grievance procedures requiring live cross-examination of victims in some jurisdictions seems to have influenced the practice of military service academies.[26] While military administrative discharge regulations do not explicitly require live victim cross-examination, service academies appear to have adopted the practice, almost without exception, of not pursuing administrative discharges for sexual misconduct unless a victim submits to live cross-examination.[27]

Victims of sexual assault often remark that participating in a trial against their perpetrator(s) and facing cross-examination feels "retraumatizing," "vindictive," and "unfulfilling."[28] This perception discourages victims from reporting assault at all or favors an administrative resolution as the preferred avenue for justice, safety, and retribution. On the other hand, counterarguments rooted in the Fifth Amendment Due Process Clause and Sixth Amendment Confrontation Clause demand cross-examination of sexual assault accusers in administrative cases where credibility is a critical issue and determinations of credibility without cross-examination of the accuser would be arbitrary.[29] The divergent practices surrounding the confrontation of complainants in administrative cases suggests the time is right to reexamine accuser confrontation in sexual misconduct administrative hearings to achieve parity across institutions with similar responsibilities to their members.

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[23] The standard of proof in administrative proceedings is often a preponderance of the evidence and occasionally clear and convincing evidence. Notably, the United States Air Force Academy extends a proof beyond a reasonable doubt standard to academic integrity adjudication boards, but this high standard seems to be an anomaly in academic adjudication across higher education and certainly among the other service academies.

[24] *See* Gordon, *supra* note 18.

[25] Odes L. Stroupe Jr., *Administrative Law—Evidence—Hearsay and the Right of Confrontation in Administrative Hearings*, 48 N.C. L. Rev. 608, 612 (1970).

[26] *See* U.S. Dep't of Defense, Instruction No. 6495.02, Vol. 1, Adult Sexual Assault Prevention and Response: Program Procedures (2024), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/649502_vol01.PDF [https://perma.cc/5K4J-ND8E].

[27] *See id.*

[28] Tovia Smith, *After Assault, Some Campuses Focus on Healing over Punishment*, Nat'l Pub. Radio (July 25, 2017), https://www.npr.org/2017/07/25/539334346 [https://perma.cc/2G54-LE6M].

[29] S*ee, e.g.*, Doe v. Univ. of Cincinnati, 872 F.3d 393, 402, 406 (6th Cir. 2017); *see also* Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018).

Part I of this Article contrasts the administrative discharge and disenrollment proceedings of the military, postsecondary education, and the current practice of military service academies. Part II argues that the current practice of military service academies to not pursue sexual misconduct disenrollments without live victim confrontation is an overly risk-adverse practice causing undue harm to victims and discouraging reporting. In doing so, the authors explain (1) why a right to live victim cross-examination does not exist in administrative procedures generally; (2) that jurisprudential trends in postsecondary education seemingly extending confrontation into all Title IX administrative procedures are in fact limited to narrower circumstances; and (3) why victim confrontation is not legally required in military service academy sexual misconduct disenrollments and why the practice should be carefully reconsidered.

## I. CURRENT ADMINISTRATIVE RESPONSES TO SEXUAL ASSAULT

Sexual misconduct is a serious issue, presenting complex challenges for the military and universities. These two institutions must frequently address allegations of sexual misconduct in order to appropriately adjudicate continued membership or enrollment of those accused, often without any criminal adjudication. Because sexual misconduct does not always result in criminal prosecution and does not entail automatic severance from an organization, the military and universities have developed their own procedures for addressing sexual misconduct allegations within statutory and regulatory guidelines.[30] One crucial aspect of administrative disciplinary boards in the military and at civilian universities is how they handle victim confrontation—whether and how the victim and offender interact during the hearing. Procedures are crafted to balance the offender's right to a fair hearing with the need to protect victims' dignity, privacy, and prevent further trauma.[31] Before critiquing military service academies' practice and procedures, it is necessary to contrast how the military and

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[30] HEATHER M. KARJANE, BONNIE S. FISHER, & FRANCIS T. CULLEN, U.S. DEP'T OF JUST., CAMPUS SEXUAL ASSAULT: HOW AMERICA'S INSTITUTIONS OF HIGHER EDUCATION RESPOND 110 (2002), https://rainn.org/pdf-files-and-other-documents/Public-Policy/Legislative-Agenda/mso44.pdf [https://perma.cc/KU2X-GPZ4].

[31] While the Military Rules of Evidence are not summarily or directly applied in administrative hearings, their interpretation in criminal trials is persuasive in applying the broad standard of relevance, particularly with regard to the treatment of victims. *See*, *e.g.*, Doe v. U.S. Merch. Marine Acad., 307 F.Supp. 3d 121, 155–56 (E.D.N.Y. 2018) (citing Grant v. Demskie, 75 F.Supp. 2d 201, 209–10 (S.D.N.Y. 1999), *aff'd*, 234 F.3d 1262 (2d Cir. 2000)) ("[T]he Court agrees that the Superintendent correctly precluded plaintiff from inquiring into Complainant's sexual activities. Not only does [Superintendent Instruction] 2016-02 establish the victim's right to exclude prior sexual history in these hearings, but this Academy policy follows New York state's rape shield law. . . . 'The purpose of New York's rape shield law is to prohibit cross-examination about a victim's sex life, [which serves] the broad purpose of protecting victims of rape from harassment and embarrassment in court, and by doing so seek[s] to lessen women's historical unwillingness to report these crimes.'").

universities approach victim confrontation during their sexual misconduct investigation processes.

### *A. Military Administrative Discharges*

Military members are subject to the Uniform Code of Military Justice (UCMJ).[32] Violations of the UCMJ can result in criminal prosecution or administrative consequences, or a combination of both.[33] Article 120 of the UCMJ includes the crimes of rape, sexual assault, aggravated sexual contact, and abusive sexual contact.[34] The crime of sexual harassment is outlined in Article 134 of the UCMJ.[35] Allegations of these offenses often start with a presumption of court-martial, unless civilian prosecutorial jurisdiction or a lack of severity or admissible evidence warrants less than criminal consequences.[36] In criminal proceedings, the rules for witnesses and burden of proof are outlined in the Manual for Courts-Martial and through various rules for courts-martial, account for the criminal defendant's Sixth Amendment right to confrontation.[37] If criminal trial is not pursued, sexual misconduct typically carries a presumption of administrative discharge.[38]

Military members are entitled to procedural due process protection when facing involuntary discharge from the military where a "stigma" attaches to the discharge due to servicemembers' liberty interest in military membership and their record of service.[39] A "stigma" attaches when a servicemember is discharged with an "under other than honorable"

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[32] ART. 2, UNIF. CODE OF MIL. JUST. (codified at 10 U.S.C. § 802 (2024)).

[33] Administrative consequences range from non-judicial punishment (or "Article 15") to written counseling. *See* MANUAL FOR COURTS-MARTIAL, *supra* note 31, at Part V, *Nonjudicial Punishment Procedure*.

[34] ART. 120, UNIF. CODE MIL. JUST. (codified at 10 U.S.C. § 920 (2024)).

[35] ART. 134, UNIF. CODE MIL. JUST. (codified at 10 U.S.C. § 934 (2024)).

[36] *See* 10 U.S.C. § 920 (2019); 10 U.S.C. § 814; 10 U.S.C. § 832 (2023).

[37] *See*, *e.g.*, MANUAL FOR COURTS-MARTIAL, *supra* note 31; *see also* United States v. Smith, 68 M.J. 445, 447 (C.A.A.F 2010) ("The right to confrontation includes the right of a military accused to cross-examine adverse witnesses."); United States v. Blazier, 68 M.J. 439, 441 (C.A.A.F. 2010) ("Before . . . testimonial hearsay may be admitted, the Confrontation Clause requires that the accused have been afforded a prior opportunity to cross-examine the witness and that the witness be unavailable.").

[38] *See*, *e.g.*, U.S. DEP'T OF THE AIR FORCE, INSTRUCTION NO. 36-3211, MILITARY SEPARATIONS, para. 18.7.12.2 (2022) [hereinafter DAFI 36-3211] (explaining that the U.S. Air Force and U.S. Space Force's mandatory initiation of discharge for sexual assault of officers); *id.* at para. 7.44.3.1 (explaining the Air Force and Space Force's mandatory initiation of discharge for sexual assault for enlisted members).

[39] *See* Canonica v. United States, 41 Fed. Cl. 516, 524 (1998) (citing Guerra v. Scruggs, 942 F.2d 270, 278 (4th Cir. 1991)); Holley v. United States, 124 F.3d 1462, 1469–70 (Fed. Cir. 1997); Vierrether v. United States, 27 Fed. Cl. 357, 364–65 (1992), *aff'd mem.*, 6 F.3d 786 (Fed. Cir. 1993).

characterization of service[40] or where the stated reason for the discharge (as captured on the Department of Defense Form 214) is false.[41]

Servicemembers lack a property interest in continued employment when properly involuntarily discharged according to procedures prescribed by their respective service Secretary.[42] Involuntary discharge proceedings are comprised of written notice of the reason for the discharge and an opportunity to respond in writing unless the worst-possible service characterization is sought or the member has sufficient longevity warranting greater due process.[43] Specifically, military authorities must provide an evidentiary administrative hearing when (1) the military is seeking an "under other than honor conditions" characterization of service (for which a stigma would attach), or (2) the servicemember has served longer than the probationary period of six years or reached non-commissioned officer status.[44]

Generally, military respondents receiving an evidentiary hearing for involuntary discharge have no right to confront testimonial witnesses.[45] Respondents have the right to be represented by counsel at their hearing and have the right to request relevant witnesses, but not to demand the production of witnesses.[46] The hearing's Legal Advisor—a neutral judge

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[40] *See Holley*, 124 F.3d at 1469 (stating that, under Army Regulation 635–100, para. 5–30b(2)(b), "honorable" or "under honorable conditions (general)" characterizations do not alone provide a stigma).

[41] *Id.* at 1469–70 ("[W]herein the [*Guerra*] court held that discharge of an enlisted serviceman for drug offenses without a pre-discharge hearing before an administrative elimination board implicated no liberty interest when the stigmatizing information was true.") (citing *Guerra*, 942 F.2d at 278–79); Casey v. United States, 8 Cl. Ct. 234, 241 (1985) (holding that the coded reason for an enlisted member's discharge was stigmatizing because it encompassed drug as well as alcohol abuse, whereas there was no allegation of drug abuse); Keef v. United States, 185 Ct. Cl. 454, 460, 468 (1968) (finding that despite the enlisted member serving more than seventeen years on active military duty, no stigma attached for granting him an honorable discharge for the convenience of the government).

[42] *Canonica*, 41 Fed. Cl. at 524 (first citing 10 U.S.C. § 1169; and then citing *Guerra*, 942 F.2d at 278); *see also* Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979) (en banc) (finding that 37 U.S.C. § 204 confers on an officer the right to pay of the rank at which he or she was appointed up until properly separated from the service), *superseded by statute*, 10 U.S.C. § 628, *as recognized in* Richey v. United States, 322 F.3d 1317 (Fed. Cir. 2003).

[43] *See* 10 U.S.C. § 630 (2024) (conferring non-probationary status for officers at six years rather than the five years required previously); U.S. COAST GUARD COMMANDANT INSTRUCTION 1000.4B, para. 11.b(6) (Mar. 2024); *Holley*, 124 F.3d at 1469–70.

[44] 10 U.S.C. § 630 (2024) (amended in 2008 to confer non-probationary status for officers at six years rather than the previous five years); *see* COMMANDANT INSTRUCTION 1000.4B, *supra* note 43, at para. 11.b(6) (providing that the Coast Guard board's entitlement for officers vests at five years); *Holley*, 124 F.3d at 1467.

[45] *See*, *e.g.*, U.S. ARMY REGULATION 15-6, paras. 7-8a(2), a(3), b(2)–(4) (providing that respondents in an Army involuntary discharge hearing may object to the testimony of witnesses and cross-examine witnesses, call witnesses and introduce evidence, and request government assistance to arrange for the presence of timely requested witnesses; however, the respondent's request for witnesses may be denied by the Legal Advisor and "[n]ormally, the fact that any evidence or witness desired by the respondent is not reasonably available is not a basis for terminating or invalidating the proceedings").

[46] *See id.*

advocate appointed to make evidentiary and procedural rulings and advise the voting members of the board—makes the final determination as to which witnesses are reasonably unavailable to testify and what evidence is permitted to be considered by the board.[47] This inevitably includes a determination about hearsay evidence when an unavailable witness's written or recorded statements are submitted as evidence.[48] Thus, a military discharge panel may proceed in which the government seeks an "under other than honorable conditions" service characterization for sexual assault or harassment, but the victim elects not to testify or be subjected to cross-examination.

### *B. College Disciplinary Panels*

Colleges and universities are obligated under Title IX, when a complaint of sexual misconduct is made, to conduct "an objective evaluation of all relevant evidence"[49] with the goal of providing an educational environment free of sex discrimination through a process that is fair and equitable for all participants.[50]

In 2020, the Department of Education codified sweeping changes in favor of respondents' rights, central of which included the requirement that formal grievance hearings may not consider any statement unless the speaker appears at the hearing and submits to cross-examination.[51] This requirement was quickly walked back by the Department of Education

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[47] *See*, *e.g.*, U.S. ARMY REGULATION 15-6, paras. 7-1d, 7-8b(2) (Army procedures for separation hearings); COMMANDANT INSTRUCTION 1000.4B, *supra* note 43, at para. N.11.c(4), N.11.d(7)(a) (describing Coast Guard officer separation hearing procedures, citing Article 49 of the UCMJ as a "general guide in determining witnesses' availability" but "[u]sing depositions or affidavits to obtain testimony of witnesses who are not reasonably available . . . is encouraged"). Importantly, under the Manual for Courts-Martial, a victim may not be required to testify at a preliminary hearing and their declining to testify "shall not serve as the sole basis for ordering a deposition" under Article 49. MANUAL FOR COURTS-MARTIAL, *supra* note 31, at Appendix 2, § 832(d)(3).

[48] In the Air Force, the regulations go so far as to provide guidance in the form of factors for the Legal Advisor to weigh in making a decision as to key witness testimony when the witness merely desires not to testify or submit to cross-examination. Factors include the type of hearsay offered, whether signed and sworn, whether supported or contradicted by other evidence, declarant availability, whether the declarant was requested to appear, and the independence of possible bias of the declarant. *See* DEP'T OF THE AIR FORCE MANUAL 51-507, ENLISTED DISCHARGE BOARDS AND BOARDS OF OFFICERS, para. 5.2.4 (Jan. 24, 2019) [hereinafter DAFMAN 51-507]. The regulation makes it explicitly clear that a "victim has an absolute right to decline to testify in an administrative proceeding" and if the victim declines, they are deemed unavailable. *Id.* at para. 5.2.5.

[49] 34 C.F.R. § 106.45(b)(6) (2024) (89 Fed. Reg. 33891).

[50] 34 C.F.R. § 106.45(b)(1)(i)–(ii) (2024) (89 Fed. Reg. 33549, 33869).

[51] 34 C.F.R. § 106.45(b)(6)(i) (2024) ("If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility."); 85 Fed. Reg. 30577 (2020); *see also* 85 Fed. Reg. 30311–14 (2020).

in the next round of proposed rulemaking,[52] opting instead to give postsecondary institutions back critical flexibility in their administrative hearings regarding live victim confrontation.

Additionally, guidance from the Department of Education after the repeal of the relevant 2020 amendment provision disallowed schools from implementing a rule in which hearings fail to consider statements not made by a live witness.[53] The requirement that victims submit to cross-examination, albeit short-lived, triggered an immediate reduction in students filing complaints and increased reluctance by victims to move forward with grievance procedures.[54]

Many alternatives to live, adversarial cross-examination are available to colleges and universities, and the current Title IX regulations allow flexibility to tailor procedures to the circumstances.[55] For example, a hearing could take place with technology assistance allowing the decisionmaker and parties to simultaneously see and hear the proceedings while a party or witness is communicating in another format.[56] Questions for cross-examination can be submitted through the decisionmaker or a neutral party.[57] In some circumstances, signed and or sworn written statements or video recordings can be used as a substitute for live appearance.[58]

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52 *See* 87 Fed. Reg. 41505 (2022) ("The Department's tentative view is that the requirement for all postsecondary institutions to hold a live hearing with advisor-conducted cross-examination exceeds what is required in order to provide equitable procedures to the parties and is not necessary to provide a respondent with a meaningful opportunity to be heard.").

53 U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON THE TITLE IX REGULATIONS ON SEXUAL HARASSMENT (June 28, 2022) [hereafter 2021 Q&A FROM OCR] https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf [https://perma.cc/G3GV-VPFS] ("Question D: Despite the court's decision, may a postsecondary school choose to maintain the prohibition on considering statements made by a party or witness who does not submit to cross-examination at a live hearing as part of its Title IX grievance process? Answer D: No. The 2020 amendments at 34 C.F.R. § 106.45(b)(1)(ii) require 'an objective evaluation of all relevant evidence.' To the extent that statements made by a party or witness who does not submit to cross-examination at a live hearing satisfy the regulation's relevance rules, they must be considered in any postsecondary school's Title IX grievance process that is initiated after July 28, 2021.").

54 87 Fed. Reg. 41458 (2022) ("Stakeholders reported to OCR that they had observed a reduction in complaints filed and greater reluctance to move forward with grievance procedures as a result of the live hearing and cross-examination requirements in the 2020 amendments.").

55 Such flexibility in Title IX regulations toward achieving fundamental fairness post-2022 was recently endorsed by the California Supreme Court in *Boermeester v. Carry*, 15 Cal. 5th 72, 90–95 (Cal. 2023).

56 87 Fed. Reg. 41390, 41505 (2022).

57 Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 68–70 (1st Cir. 2019).

58 In some circumstances, real-time live questioning is required. Generally, these cases have been qualified with the condition that the disciplinary determination rests on a witness's credibility. In the Second Circuit, cross-examination is required when the resolution depends on an assessment of credibility. *See* Winnick v. Manning, 460 F.2d 545, 549–50 (2d Cir. 1972). In the Third Circuit, the court held a university's contractual promises of fair and equitable treatment required a live adversarial hearing and the opportunity for the accused or their representative to cross-examine witnesses. *See* Doe v. Univ. of Sciences, 961 F.3d 203, 215 (2020). Other circuits have held that live questioning is required in cases turning on credibility, but such questioning

Rather than prescribe upon all colleges and universities the most adversarial method of truth-seeking known under American jurisprudence, the Department rightly opted to allow schools the ability to tailor procedures to balance fairness and dignity for the parties, while also following ever-changing judicial interpretations of due process on the particular issue of victim cross-examination.[59]

### *C. Current Military Service Academy Sexual Assault Discharge Practice*

Historically, the primary avenue to separate service academy cadets for misconduct was courts-martial.[60] After World War II, then-existing service academies changed their practices to focus on general disenrollments for most cadets demonstrating significant misconduct, while only serious UCMJ violations would lead to court-martial.[61] Today, each of the military service academies has their own distinct set of regulations and policies for administrative disenrollment proceedings.[62] While key similarities exist across the academies, meaningful distinctions exist as well, warranting an in-depth comparison of differences rather than a summary of each.[63] One key similarity is durability: each of the academies' procedures were drafted to comply with minimum constitutional due process requirements

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may occur through a third party, a neutral, the hearing panel or the decisionmaker. *See*, *e.g.*, *Haidak*, 933 F.3d at 69–70 (1st Cir. 2019); *see also* Overdam v. Texas A&M Univ., 43 F.4th 522, 529–30 (5th Cir. 2022); Nash v. Auburn Univ., 812 F.2d 655, 663–64 (11th Cir. 1987); Doe v. Univ. of Ark.-Fayetteville, 974 F.3d 858, 867–68 (8th Cir. 2020) (supporting respondent's ability to submit questions through a hearing panel, with discretion as to whether to pose questions to the witness satisfied due process).

[59] *See generally* 87 Fed. Reg. 41390, 41505 (2022).

[60] Robert P. Coyne & A. Robert Thorup, *West Point Honor Code Separations: Duty, Honor, Country . . . Fairness*? 27 AM. U. L. REV. 823, 831 (1978)*; see also* Justin Freeland, *All the Process That Is Due: An Article on Cadet Disenrollments from the United States Military Academy and the Army Reserve Officers' Training Corps*, 25 ARMY LAW. 5 (2015).

[61] *Id.* at 833.

[62] *See, e.g.*, U.S. ARMY REGULATION 150-1, UNITED STATES MILITARY ACADEMY ORGANIZATION, ADMINISTRATION, AND OPERATION (Jan. 12, 2021) [hereinafter ARMY REGULATION 150-1] (outlining the process of military separation and disenrollment for cadets at the United States Military Academy); U.S. AIR FORCE ACADEMY INSTRUCTION 36-3504, DISENROLLMENT OF UNITED STATES AIR FORCE ACADEMY CADETS; U.S. NAVAL ACADEMY INSTRUCTION 1610.6A, U.S. NAVAL ACADEMY MIDSHIPMEN DISENROLLMENT PROCEDURES FOR CASES INVOLVING UNSATISFACTORY CONDUCT (Mar. 25, 2021) [hereinafter USNAI 1610.6A] (outlining disenrollment procedures for U.S. Naval Academy midshipmen); COMMANDANT OF MIDSHIPMEN INSTRUCTION 1610.2E, ADMINISTRATIVE PERFORMANCE AND CONDUCT SYSTEM (outlining the conduct system and violations for potential cases of misconduct).

[63] Academy-specific regulations must comply with the Department of Defense's overarching guidance. *See* U.S. DEP'T OF DEFENSE, DIRECTIVE NO. 1332.22, MILITARY SERVICE ACADEMIES (Sept. 24, 2015) (incorporating Change 1 on Nov. 1, 2023). The Academies are bound to follow their own procedures or risk violating procedural due process. *See*, *e.g.*, Lightsey v. King, 567 F.Supp. 645, 649–50 (E.D.N.Y. 1983) (holding that the academy's refusal to reestablish exam grade after Honor Board exonerated midshipman of cheating violated due process); *see also* Hupart v. Board of Higher Educ., 420 F.Supp. 1087, 1107 (S.D.N.Y. 1976); U.S. *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954).

as held in *Goss v. Lopez*[64] and *Mathews v. Eldridge*.[65] Courts have held that constitutional procedural due process applies to cadet disenrollments for misconduct[66] and federal appellate courts have upheld the procedures from a confrontation perspective.[67]

While disenrollment procedures vary across the service academies, they are consistent in that no statutory or regulatory requirement exists requiring live victim cross-examination to properly discharge a cadet or midshipman. Each of the service academies provides a form of hearing for sexual assault-based disenrollments, but these differ by institution and the nature of the allegation(s) involved.[68] Despite the academies all conducting live administrative hearings in some form prior to disenrollment for sexual assault, none explicitly include in their procedures a requirement for victim cross-examination.[69] However, current practices consistent across the service academies is that in sexual misconduct disenrollment cases, the respondent is almost always supplied a *de facto* right to live

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64 Goss v. Lopez, 419 U.S. 565, 578 (1975) ("[T]he interpretation and application of the Due Process Clause are intensely practical matters . . . .").

65 Mathews v. Eldridge, 424 U.S. 319, 336 (1976).

66 *See, e.g.*, Andrews v. Knowlton, 509 F.2d 898, 905 (2d Cir. 1975); Wasson v. Trowbridge, 382 F.2d 807, 811–13 (2d Cir. 1967).

67 N.B. v. United States, 552 F.Supp. 3d 387, 400 (E.D.N.Y. 2021) (citing Doe v. U.S. Merch. Marine Acad., 307 F.Supp. 3d 121, 127 (E.D.N.Y. 2018); Cassidy v. United States, No. 17-CV-4187(SJF)(AYS), 2018 U.S. Dist. LEXIS 198733, at *13 (E.D.N.Y. Nov. 20, 2018)); *see also* Doolen v. Wormuth, 5 F.4th 125, 133 (2d Cir. 2021) ("The Army provides a robust combination of pre-and post-deprivation procedures for cadets facing separation from West Point. By the time the Army begins considering separation, the cadet has already appeared in person before an IO, presented live testimony, and cross-examined witnesses at the CI. *See* USCC Reg. No. 351-1 [para.] 104[.]").

68 *See generally* U.S. MILITARY ACADEMY REGULATION 385-1 (outlining disciplinary regulations and policies for cadets at the United States Military Academy); U.S. NAVAL ACADEMY, COMMANDANT OF MIDSHIPMEN INSTRUCTION 1610.2M, ADMINISTRATIVE PERFORMANCE AND CONDUCT SYSTEM, para. 5.9(d) (Mar. 6, 2023); *see also* U.S. AIR FORCE ACADEMY INSTRUCTION 36-3504, DISENROLLMENT OF UNITED STATES AIR FORCE ACADEMY CADETS, para. 25.2 (Aug. 14, 2022) [hereinafter USAFAI 36-3504] (providing that, although the Air Force Academy is the only service academy that does not explicitly require a live hearing for all misconduct-based enrollments like sexual misconduct, the Academy must offer a live hearing to the Respondent when an Under Other than Honorable Conditions (UOTHC) characterization of service is sought, which is normally appropriate for sexual misconduct cases).

69 *See* DAFI 36-3211, *supra* note 38, at para. 8.2.2 (showing that the Air Force Academy only provides a live hearing when the UOTHC service characterization is recommended, which is often the case in sexual assault cases); ARMY REGULATION 150-1, *supra* note 62 (outlining the process of military separation and disenrollment for cadets at the United States Military Academy); USNAI 1610.6A, *supra* note 62; COMMANDANT OF MIDSHIPMEN INSTRUCTION 1610.2E, *supra* note 62 (outlining the conduct system and violations for potential cases of misconduct); N.B. v. United States, 552 F.Supp. 3d 387 (E.D.N.Y. 2021) (outlining the administrative hearing process at the Merchant Marine Academy); *see also* U.S. MERCH. MARINE ACAD. SUPERINTENDENT INSTRUCTION 2018-05, REPORTING, INVESTIGATING, AND RESOLVING COMPLAINTS OF SEXUAL ASSAULT, SEXUAL OR GENDER-BASED HARASSMENT, RELATIONSHIP VIOLENCE, AND STALKING AGAINST MIDSHIPMEN (May 31, 2018) [hereinafter SUPERINTENDENT INSTRUCTION 2018-05] (including the Merchant Marine Academy's procedures for processing sexual assault and harassment).

cross-examination due to an unwillingness to proceed to a disenrollment hearing without a live victim.[70] Thus, it appears that a risk-averse practice has emerged in which none of the service academies are willing to pursue an Under Other than Honorable Conditions (stigma-attaching) discharge for sexual misconduct, or recoupment triggering disenrollment, without live victim testimony subject to cross-examination.[71] This practice was likely informed in part by regulatory and judicial trends emerging in the Title IX context in recent years,[72] but none of the service branch or service academy regulations prescribe such a rigid policy.[73]

For all the academies, military discharge boards are fact-finding bodies that provide recommendations and do not have authority to directly disenroll cadets.[74] Instead, the board makes its recommendation to the

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[70] The absence of disenrollment hearings without live victim testimony is discussed in great depth within each service academy section *infra*. Notably, the U.S. Merchant Marine Academy does not afford the respondent or the respondent's advisor the ability to directly cross-examine a crime victim. *See supra* text accompanying note 69.

[71] Interview of Mr. Dominic Angiollo, Director of Culture and Climate, Dean of Faculty, U.S. Air Force Acad. (June 14, 2024); *see also* U.S. DEP'T OF DEFENSE, *supra* note 9, at Appendix D (recounting that, in academic year 2022–2023, 166 reports of sexual assault or sexual harassment were received by the service academies, of which sixty-five reports were unrestricted and forty-seven subjects were considered for possible command action. Of those forty-seven, the evidence supported command action for thirty-three subjects. Of those, fourteen subjects had "command action precluded/respected victims' desired non-participation" and a combined nineteen subjects received "other adverse administrative actions" or "other misconduct charges substantiated," demonstrating that the decision to pursue disciplinary action is dependent on a willing victim's participation or the ability to dispose of the case with other administrative action short of discharge).

[72] For example, in 2020, the United States Department of Education's Office of Civil Rights amended federal regulations implementing Title IX that prohibited colleges and universities from considering in formal grievance procedures all statements arising from witnesses not subject to live cross-examination. 34 C.F.R. § 106.45(b)(6)(i) (85 Fed. Reg. 300574) (2020). This rule was stayed nation-wide by a federal judge in July 2021, finding it arbitrary and capricious. *See* Victim Rights Law Ctr. v. Cardona, 552 F.Supp. 3d 104, 134 (D. Mass. 2021). The rule was then modified to grant colleges discretion to permit such a rule in their formal grievance procedures. 34 C.F.R. § 106.45(b)(6) (2024). Even prior to these regulatory amendments, multiple judges sided with appellants challenging their findings of responsibility when disciplinary hearings resolved credibility determinations in favor of the complainant. *See* Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018); Doe v. Allee, 30 Cal. App. 5th 1036, 1039 (Cal. Ct. App. 2019), *overruled by* Boermeester v. Carry, 15 Cal. 5th 72, 95 (Cal. 2023), *cert. denied*, 144 S. Ct. 497 (2023); Overdam v. Tex. A&M Univ., 43 F.4th 522, 529 (5th Cir. 2022) (holding that due process requires some opportunity for real-time questioning but does not require questioning by the respondent's attorney).

[73] *See supra* text accompanying note 69.

[74] The disenrollment boards' recommendations are generally presented to the discharge authority for decision. Final discharge authority at the Military Academy is the Superintendent except in cases where recoupment or enlisted service is required. *See* ARMY REGULATION 150-1, *supra* note 62, at para. 8.2. Final discharge authority at the Naval Academy is the Assistant Secretary of the Navy for Manpower & Reserve Affairs. *See* COMMANDANT OF MIDSHIPMEN INSTRUCTION 1610.2M, *supra* note 68, at para. 5.9(d). Final discharge authority at the Air Force Academy is the Superintendent unless an Under Other than Honorable Conditions discharge is given, in which case final approval is the Secretary of the Air Force. *See* U.S. AIR FORCE ACADEMY INSTRUCTION 36-3504, DISENROLLMENT OF UNITED STATES AIR FORCE ACADEMY CADETS, para. 25.3 (2022) [hereinafter USAFAI 36-3504]. Final discharge authority

Superintendent of the respective academy, and many of the academies must forward the Superintendent's recommendation to their respective service Secretary.[75] Discharge boards typically consist of multiple officers with voting power that may be challenged for removal by the respondent.[76] Throughout the proceedings of a military discharge board, the offender is offered the right to counsel, but counsel's involvement in the hearing itself varies from academy to academy.

1. United States Military Academy Disenrollment Procedures

Cadets at the United States Military Academy (USMA) at West Point alleged to have committed serious offenses warranting administrative separation are referred to a hearing before an investigating officer by the Commandant of Cadets.[77] When the Military Academy initiates disenrollment, the Academy must provide notice to the cadet and access to counsel.[78] Notice is fulfilled through a written document informing a cadet of the grounds for disenrollment and their rights.[79] "Access to counsel" includes the right of a cadet to seek advice from and be represented by a military attorney or a privately hired civilian attorney for formal misconduct hearings.[80]

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for sexual misconduct cases at the Merchant Marine Academy is the Maritime Administrator. *See* SUPERINTENDENT INSTRUCTION 2018-05, *supra* note 69, at para. 8(b)(11). Final discharge authority at the Coast Guard Academy is the Superintendent. *See* U.S. DEP'T OF HOMELAND SECURITY, U.S. COAST GUARD SUPERINTENDENT INSTRUCTION M5215.2N, REGULATIONS OF THE CORPS OF CADETS, paras. 1.E.1.g.(1)(e), 1.E.1.1.(1)(a)(3) (June 24, 2019).

75 *See id.*

76 *See*, *e.g.*, USNAI 1610.6A, *supra* note 62, at enclosure 3 (implementing a discharge board that consists of not less than three Navy or Marine Corps officers and providing a right to the accused cadet to request different board members on the basis of bias, but approval for board member changes rests in the authority of the legal advisor.).

77 ARMY REGULATION 150-1, *supra* note 62, at paras. 6-10, 6-17, 8-3; Freeland, *supra* note 60, at 6 n.17 (citing U.S. ARMY REGULATION 210-26, U.S. MILITARY ACADEMY, ch. 6 (Sept. 6, 2011), at paras. 6-4 (providing notice), 7-6 (describing access to legal counsel)); *see also* ARMY REGULATION 150-1, *supra* note 62, at para. 6-6(b); *see generally id.*, at paras. 1-17(a) to 1-17(b) (providing a description of the position and responsibilities of the Commandant of Cadets).

78 Freeland, *supra* note 60, at 10.

79 ARMY REGULATION 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS, para. 7-5 (Apr. 1, 2016) (dictating that notice requires the recorder to provide the respondent all relevant unclassified files and a notice letter enclosing specific information, including the date of hearing, matter, allegations, respondent's rights, witness information, and procedures for examining classified information), https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r15_6.pdf [https://perma.cc/8HZK-8V9R]; *see also* U.S. MILITARY ACADEMY REGULATION 1-10, PROCEDURES FOR MISCONDUCT HEARINGS, para. 2-1(d) (Dec. 13, 2023) [hereinafter USMA REGULATION 1-10].

80 ARMY REGULATION 150-1, *supra* note 62, at paras. 6-4 (stating sanctions that may be awarded to cadets following a formal finding of conduct violation), 6-6(b) (right to a hearing under cadet disciplinary system).

The Military Academy must hold a misconduct hearing or conduct investigation before disenrolling a cadet.[81] Participants in the disenrollment process include the cadet respondent, the investigating officer or board, the appointing and approving authorities, the legal advisor, and the supplied or privately hired attorney conducting the legal review.[82] During the hearing, the cadet respondent is afforded the right to appear and present a defense.[83] Additionally, the respondent is allowed to submit evidence, including documents and witness testimony.[84] While hearsay evidence is permissible, and witnesses may confirm their previous sworn or unsworn statements, the Military Academy regulations strongly infer the live testimony of a complaining witness is necessary to conduct a formal hearing.[85]

Post-investigation, but prior to comment by the Commandant of Cadets and action on the disenrollment by the Superintendent, the Staff Judge Advocate conducts an official review.[86] Once approved by the reviewing parties, the Academy forwards the disenrollment to the Department of the Army for final approval when required.[87] The respondent cadet is able to appeal the final decision to the Army Board for Correction of Military Records.[88] After exploring all administrative appeal options, a cadet may file a due process claim in federal court.[89] Lacking an error in the

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81 ARMY REGULATION 150-1, *supra* note 62, at para. 6-6(b); *see also* Freeland, *supra* note 60, at 10.

82 Freeland, *supra* note 60, at 9; *see also* USMA REGULATION 1-10, *supra* note 79, at para. 2-1(c).

83 Freeland, *supra* note 60, at 10.

84 USMA REGULATION 1-10, *supra* note 79, at paras. 2-9(a) to 2-9(d) ("Upon receipt of a written request, the [Investigating Officer] or board president will arrange for the presence of all witnesses requested by the respondent, provided the [Investigating Officer] or board president determines such witness to be relevant, necessary, not cumulative, and reasonably available. . . .The [Investigating Officer] or board has no authority to subpoena witnesses to appear and testify at the misconduct hearing. Military personnel and federal civilian employees, however, may be ordered to appear and testify by an appropriate commander or supervisor. Appearance as a witness is an official duty for both military personnel and federal civilian employees, and takes precedence over other duties, including cadet duties."); 2-11(c)(3) (respondent has the right to call witnesses); 2-11(f)(2) (while witnesses may be asked to confirm previously made statements, "[t]he witnesses remain subject to questioning on the substance of such statements"); 2-12(c)(5) (provision about ordering witnesses to testify only contemplates that no military witness will be compelled to self-incriminate but is silent regarding the desire of a victim not to testify); *but see* paragraph 2-11(f)(3) ("written statements may be considered regardless of whether the person making the statement also testifies").

85 Freeland, *supra* note 60, at 9.

86 *Id.*

87 *Id.* at 10.

88 *Id*. at 9 (citing Phillips v. United States, 910 F.Supp. 101, 106 (E.D.N.Y. 1996)); *see* Freeland, *supra* note 60, at 10 n. 98 ("Violations of procedural due process include defects in notice, inadequacy of hearing, or the agency failing to follow its rules . . . [d]isputing the recoupment amount is essentially a claims action requiring a waiver of sovereign immunity by the government.").

89 *Compare, e.g.*, Hagopian v. Knowlton, 346 F.Supp. 29 (S.D.N.Y. 1972) (providing an unfavorable outcome for the government, holding that errors by the USMA in following its own administrative processes resulted in favorable outcomes for Hagopian), *with* Spadone v.

disenrollment process, the likelihood of success on challenging a military separation decision in federal court is low.[90]

2. United States Naval Academy Procedures

At the United States Naval Academy, it is the responsibility of the Commandant of Midshipmen to govern the disciplinary process.[91] Offenses are categorized into three levels: minor, major, and Separation Potential Offense (SEPP).[92] All reports of suspected "major" or "SEPP" offenses require an investigation and the Commandant's Legal Advisor reviews whether sufficient evidence exists to support forwarding to an adjudicative hearing.[93] Additionally, any alleged offense, including sexual harassment, discrimination, or an equal opportunity violation, require an investigation and must be reviewed by the Command Managed Equal Opportunity (CMEO) Representative and Commandant's Legal Advisor.[94] If an investigation is required, a Preliminary Investigative Officer is assigned to interview relevant witnesses, collect applicable documents regarding the incident, and complete the Preliminary Inquiry Report (PIR).[95] In cases of misconduct that are entered into the conduct system as a "major" or "SEPP" offense, the adjudicating authority may make a recommendation to the Commandant that the case be handled via a Midshipman Discharge Board per U.S. Naval Academy Instruction 1610.6A, which outlines the Naval Academy's processes for its version of an administrative separation hearing.[96]

A Midshipman Discharge Board is an administrative fact-finding body consisting of not less than three Navy or Marine Corps officers with voting power at the end of the case. Additional non-voting members present in the process include a nonvoting recorder, a nonvoting legal advisor to the Board, and the offending midshipman.[97] The midshipman is to be notified of the hearing at least fifteen days prior of the date, time, and location to

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McHugh, 10 F.Supp. 3d 41 (D.D.C. 2014), and United States v. Bush, 247 F.Supp. 2d 783 (M.D.N.C. 2002) (cases resulting in favorable outcomes for the government)).

90 Daniels v. United States, 947 F.Supp. 2d 11, 13 (D.C. Cir. 2013) ("Courts have found challenges to military personnel decisions to be justiciable only in those limited circumstances where the plaintiff was challenging the procedure that the military employed in its decision-making process.").

91 COMMANDANT OF MIDSHIPMEN INSTRUCTION 1610.2M, *supra* note 68, at ch. 1 3-5, tbl. 1-1 (Minor Conduct Offenses include first-time minor-level offenses. Major Conduct Offenses are more serious and/or not first-time violations and involve investigations. SEPP offenses are the most serious offenses with the adjudicating authority being the Deputy Commandant, also known as the legacy "6k" offenses.); *id.* at para. 2.4 (Sexual misconduct and sexual harassment are SEPP offenses.).

92 *Id.*

93 *Id*. at para. 1.10(b).

94 *Id*. at para. 3.1(a)(2).

95 *Id*. at para. 3.1(c).

96 USNAI 1610.6A, *supra* note 62, at enclosure 3, para. 1.

97 *See id.* at enclosure 3, paras. 1–3.

their case; each of the reasons for which they are being investigated and are being required to show cause for retention at USNA; the least favorable characterization of service which may be recommended by the Board; and their rights before, during, and after the Board.[98] The respondent is offered the right to counsel, and counsel may fully represent them at the Board.[99]

Throughout the board hearing, the midshipman may request witnesses, have access to records relevant to the case, question witnesses, provide oral argument, receive a copy of the Board's decision, and make a post-board statement.[100] The Naval Academy's regulation states that witnesses not on active duty must voluntarily agree to testify; witnesses more than one hundred miles from Annapolis, Maryland, are automatically considered not reasonably available.[101] However, "[t]he Superintendent shall make available for personal appearance before a Board active duty or civilian witnesses under his or her jurisdiction whose personal appearance is essential to a fair determination of the facts."[102] Thus, a midshipman cadet victim may "decline an invitation," however, "[m]ilitary personnel can be ordered to appear by their Commanding Officers."[103] These provisions strongly imply that if a victim chooses to report, they will need to voluntarily submit to live cross-examination or may be ordered to do so. Witnesses may appear telephonically or via video.[104]

The Board will make a determination, by majority vote, based on a preponderance of the evidence presented at the hearing.[105] If separation from the Naval Academy is recommended, the Board must provide a characterization of service recommendation, based on the evidence presented, the record of the respondent's service, and consistent with the characterization of service descriptions.[106] Following an investigation where

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98 *See id.*

99 *See id.* at enclosure 3, para. 5.i. At the Naval Academy, respondents may request military counsel of their choice and may elect between representation by appointed counsel and representation by individual counsel. Counsel, on behalf of the respondent, may "question any witness who appears before the Board or who testifies by other means" and may present oral or written argument." *Id.*

100 *See id.* at enclosure 3, para. 5(b).

101 *See id.* at enclosure 3, paras. 7, 7b(2), 7.e.

102 *Id.* at enclosure 3, para. 7(b).

103 *Id.* at enclosure 3, para. 7(b)(2); *see also* COMMANDANT OF MIDSHIPMEN INSTRUCTION 1610.2M, *supra* note 68, at para. 4.2(h) ("Adjudicative hearings are intended to be non-adversarial. As such, the Adjudicating Authority need not necessarily call witnesses to establish the facts and circumstances regarding cases unless witnesses are requested by the accused midshipman, have relevant testimony to provide, and are reasonably available. Regardless of witness inputs, the Adjudicating Authority may rely solely upon documentary evidence to find a midshipman guilty of the offense(s) charged.").

104 *See* USNAI 1610.6A, *supra* note 62, at enclosure 3, para. 7(a). Witnesses may testify by other means including telephone, VTC, etc. *See id.*

105 *See id.* at enclosure 3, para. 9.

106 *See id.* at enclosure 3, para. 9(a)(3).

the Board recommends separation, the Commandant of Midshipmen will recommend disenrollment to the Superintendent.[107] The Superintendent recommends disenrollment to the final decision authority, the Assistant Secretary of the Navy for Manpower and Reserve Affairs. At each stage, the midshipman respondent is given an opportunity to review each recommendation.[108]

3. United States Air Force Academy Procedures

Different from the other military service academies, the United States Air Force Academy, along with the United States Coast Guard Academy, are the only academies whose procedures permit disenrolling cadets without a hearing for honorable or general conditions discharges.[109] The other military service academies conduct live hearings of some kind prior to any disenrollment.[110] If a cadet is alleged to have committed other offenses warranting disenrollment in addition to sexual misconduct, and the victim of the sexual misconduct is unwilling to be subjected to cross-examination or otherwise participate in a live hearing, the current practice at the Air Force Academy is to pursue disenrollment on the non- sexual misconduct bases for discharge.[111] This practice avoids having to substantiate a sexual misconduct offense without an opportunity for cross-examination, albeit at times results in a better characterization of service than UOTHC.[112]

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107 *See id.* at enclosure 3, para. 8.

108 *See* COMMANDANT OF MIDSHIPMEN INSTRUCTION 1610.2M, *supra* note 68, at 4–5, 5–12.

109 *See* U.S. AIR FORCE ACADEMY INSTRUCTION 36-3504, DISENROLLMENT OF UNITED STATES AIR FORCE ACADEMY CADETS, para. 25.2 (Aug. 15, 2022) [hereinafter USAFAI 36-3504] (outlining disenrollment procedures, namely a formal hearing, for involuntary discharges warranting an under than honorable conditions characterization).

110 *See* USNAI 1610.6A, *supra* note 62, at para. 8 ("Before the Superintendent makes a conduct determination . . . the Commandant of the Brigade of Midshipmen will conduct a hearing for unsatisfactory conduct."); ARMY REGULATION 150-1, *supra* note 62, at para. 6-6(b) ("Before sanctioning a cadet for conduct deficiency, the cadet will be afforded a hearing to determine whether the cadet is deficient in conduct."); U.S. COAST GUARD ACADEMY, REGULATIONS FOR THE CORPS OF CADETS, 2-4-01(d) ("Cadets will normally be afforded due process in the form of a hearing . . . ."); U.S. MERCHANT MARINE ACADEMY, MIDSHIPMEN REGULATIONS 2018-07, para.4.2 ("A Midshipman has the following rights during a conduct proceeding . . . to have a closed Mast hearing . . . ."), para. 6.1 (noting that the Superintendent may order a hearing be convened for any offense that may be sufficiently grave as to warrant a recommendation for disenrollment).

111 Interview of Mr. Dominic Angiollo, *supra* note 71.

112 This practice emerged in roughly 2014 when the Air Force Academy changed its disenrollment procedures to mirror those of the broader Air Force and other service branches. *See* discussion *supra* Part I.A. There have been two exceptions to this practice—(1) a disenrollment case in which a cadet is accused of multiple sexual offenses and at least one of the victims is willing to testify at the hearing, and (2) substitution of a videotaped investigative interview of a victim as a substitute for live testimony regarding sexual misconduct as part of a broader disenrollment hearing including non-sexual misconduct. However, these exceptions have been exceedingly rare. *Id.*

When an Air Force Academy cadet is considered for disenrollment and a live evidentiary hearing is not required, the cadet still receives substantial procedural due process, despite limited public criticism asserting otherwise.[113] Disenrollment and subsequent discharge for all Air Force Academy cadets are initiated by a cadet's commander, with recommendation from the next-higher commander, through the Commandant to the Superintendent.[114] Upon initiation of disenrollment, the cadet is formally notified in writing of the initiation of the disenrollment process, the specific reasons for the action, and their rights throughout the proceedings.[115] The cadet-respondent has the right to request an appearance before the initiator commander and submit statements in rebuttal within three duty days of the date of receipt of the notification.[116] Aside from appearing before their initiator, cadets are entitled to request a personal appearance with the Commandant of Cadets and may request a personal appearance with the Air Force Academy Superintendent, but an appearance does not have to be granted.[117] Such appearances are not factfinding inquiries but rather in-person presentations by the respondent.[118] Additionally, the cadet has access to legal counsel and representation and is to be provided copies of the documents to be forwarded to the disenrollment authority in support of the recommendation. This system for discharge applies to cadets being disenrolled over reasons of misconduct including behavior infractions and Uniform Code of Military Justice or civilian law violations, if an UOTHC characterization is not sought.[119]

The notification version of the cadet disenrollment process outlined above supplies the two minimum constitutional requirements of notice and an opportunity to be heard. At the initiation of separation and a recommendation for a characterization of UOTHC, the cadet is given an evidentiary administrative hearing before discharge.[120] Thus, far greater

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113 *See*, *e.g.*, Sean Timmons, *Know the Risks Before You Go: The Air Force Academy will Disenroll a Cadet with Less Due Process than Either the Army or Navy Academies*, TULLY RINCKEY (Aug. 26, 2020), https://www.tullylegal.com/resources/articles/know-the-risks-before-you-go/ [https://perma.cc/H66E-X7BW].

114 *See* USAFAI 36-3504, *supra* note 109, at para. 23.3.

115 *See id.* at para. 23.3.4.1.

116 *See id.* at para. 23.5, 23.5.5–23.5.6.

117 *See id.* at para. 23.4.

118 *See id.* at 18, para. 23.4.

119 *See id.* at 21, para. 25.2 ("If the underlying misconduct is serious enough to potentially warrant an under other than honorable conditions (UOTHC), an involuntary discharge action should be initiated. When an involuntary discharge action recommends the cadet be discharged with a UOTHC characterization, the procedures set forth in AFI 36-3206, Administrative Discharge Procedures for Commissioned Officers, AFI 36-3207, Separating Commissioned Officers, and AFMAN 51-507, Enlisted Discharge Boards and Boards of Officers, will be followed with appropriate modifications necessary for application to a cadet.").

120 *See id.*

procedural due process is given for what courts have found to be stigma-attaching discharges via the UOTHC designation.[121] These procedures reflect the broader administrative discharge construct for the military generally, as discussed in Part I.A *supra*.

Evidentiary rules for administrative hearings are different than criminal requirements. The Air Force Academy's written procedures adopt those of the broader Air Force by explicitly stating that hearsay may be admissible in an administrative hearing as determined by the legal advisor, or judge advocate appointed to preside over the proceedings.[122] Despite the greater procedural due process supplied by current evidentiary hearing procedures, there is no rule that requires live witness cross-examination.[123] In fact, victims have an explicit administrative "right" to decline an invitation to testify in an evidentiary hearing—deeming the invited victim "unavailable."[124] In these circumstances, the legal advisor is given the authority to evaluate any substitute evidence's quality in determining its admissibility.[125] Currently, no rule in the Air Force's rules for administrative hearings require victims to be present and open to live cross-examination for an administrative sexual misconduct administrative case to proceed.[126]

4. United States Coast Guard Academy Procedures

The United States Coast Guard Academy categorizes sexual misconduct, including assault, harassment, and non-consensual sexual behavior, as Class I offenses warranting an administrative hearing or criminal trial.[127] Class I offenses may be referred by the Assistant

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121 *See* DAFMAN 51-507, *supra* note 48, at 8, para. 3.1.

122 *See id.* at 18, paras. 5.2.3, 5.2.5; *see also* USAFAI 36-3504, *supra* note 109, at para. 25.2.

123 *See* DAFMAN 51-507, s*upra* note 48, at 11, para. 3.3.2.3.1.

124 *Id.* at 18, para. 5.2.5 ("[A] victim has an absolute right to decline to testify in an administrative proceeding. A victim who is invited but declines to testify in a discharge board shall be determined to be unavailable.").

125 *See id.* at 18, para. 5.2.4. (noting that the legal advisor considers the following factors in determining whether hearsay evidence is to be included: "the type of hearsay offered; whether the statements are signed and sworn as opposed to anonymous, oral, or unsworn; whether the statements are supported or contradicted by statements made in the hearing; whether the declarant is available to testify; whether the party admitting the hearsay statement requested the appearance of the declarant; whether the declarant is unavailable; whether the hearsay is corroborated by other competent evidence; and the independence or possible bias of the declarant").

126 *See* DAFI 36-3211, *supra* note 38, at 350–51, paras. 20.25, 20.27.1.3.2; *see also* DAFMAN 51-507, *supra* note 48, at 15, para. 4.4.1.1 (noting that for the admissibility of witness testimony and hearsay evidence, the legal advisor may impose reasonable restrictions on evidence introduced by the respondent that conflicts with previously adjudicated matters).

127 *See* SUPERINTENDENT INSTRUCTION M5215.2N, *supra* note 74, at 80, ch. 4, ch. 12, para. I.2.b.8.

Commandant to Class I Hearing or to the Commandant, who in turn may refer the case to an Executive Board or the Superintendent with a recommendation for disenrollment.[128] The Executive Board is an advisory board tasked with conducting impartial inquiries surrounding disciplinary circumstances.[129] The Executive Board at the Coast Guard Academy, similar to other Service Academies, includes three voting numbers and other non-voting participants.[130] Like other service academies, the Coast Guard Academy affords a cadet due process consisting of notification,[131] access to counsel,[132] and a chance to be heard at each of the proceedings,[133] however the degree of each varies by hearing.

Sexual misconduct cases not proceeding to criminal trial should be processed by an Executive Board to pursue an UOTHC characterization. During the Executive Board proceeding, cadets have the right to be present during proceedings, examine and object to the presentation of any information available to the Board, cross-examine any witnesses coming before the board, introduce evidence, present witnesses, make a closing statement at the conclusion of the presentation of evidence, select an advisor, and request civilian counsel at the cadet's expense.[134] If the Superintendent convenes an Executive Board and requests a recommendation for an UOTHC service characterization, the cadet is provided a judge advocate to represent them at the hearing.[135] While a cadet is permitted to request civilian counsel at their own expense, the civilian counsel may only serve as an advisor and may not argue the case.[136]

The President of the Executive Board (the Assistant Superintendent) must decide all matters relating to procedures and witnesses.[137] In its discretion, the Executive Board may adopt procedural rules from those designed for criminal procedures under the Manual for Courts- Martial,

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128 *See id.* at 267, ch. 2, para. D.1.d ("A 'Class I Hearing,' is an administrative proceeding conducted by a Class I Authority to inquire into the facts concerning a reported offense committed by a cadet, and if appropriate, to award a penalty."); *see also id.* at ch. 12, para. I.2.b.

129 *See id.* at 13, ch. 1, para. E.1.a, c.

130 *See id.* at 16, ch. 1, para. E.1.d.(2).f (noting that board members are appointed by the Superintendent from among the available officers and civilian staff of the Coast Guard Academy and should be experienced, unbiased members).

131 *See id.* at 14, ch.1, para. E.1.d.(1).a ("Cadets will be allowed a minimum of three working days to prepare for an appearance before the Board. This three working day notification period commences when the cadets are informed of their appearance before the Board and are given a copy of their Executive Board folder.").

132 *See id.* at 14, ch.1, para. E.1.d.(1).b–c (noting that cadets may have a faculty or staff advisor assist them before attending an Executive Board hearing and may also consult civilian counsel at their own expense).

133 *See id.* at 15, ch. 1, para. E.1.d.(1).f–g (noting that cadets have the right to "testify as a witness . . . to making a closing statement at the conclusion of presentation of evidence").

134 *See id.* at 15, ch. 1, para. E.1.d.(2).a–j.

135 *See id.* at 15, ch 1, para. E.1.d.(d).

136 *See id.* at 15 ch. 1, para. E.1.d.(2).i.

137 *See id.* at 17 ch. 1, para. E.1.g.(1).

including rules implementing the constitutional right to confront witnesses.[138] The Coast Guard Academy regulation is silent as to whether all witnesses requested by the respondent must be granted but does instill significant discretion in the Assistant Superintendent, guided by a legal advisor.[139] The presence of a certified judge advocate to represent the respondent in cases in which UOTHC is recommended strongly implies that counsel also represent the respondent in questioning the complaining witness. The Executive Board ultimately presents a report to the Superintendent who has the authority to disenroll the cadet.[140]5. United States Merchant Marine Academy Procedures

Like most other service academies, the United States Merchant Marine Academy requires a live hearing for sexual misconduct-based disenrollment.[141] However, the Merchant Marine Academy stands out as the only service academy that prohibits direct confrontation of sexual assault or sexual harassment victims, by the respondent or their advisor, in such hearings.[142] The Merchant Marine Academy also has special procedures for sexual assault or harassment disenrollments.[143] For example, investigators and hearing officers must receive regular training on issues related to sexual assault, sexual and gender-based harassment, relationship violence, and stalking.[144]

Additionally, a sexual misconduct disenrollment may proceed to a disciplinary hearing before the Superintendent, or most commonly, to an Executive Board of three members.[145] Such a board determines any witnesses it wishes to hear from and allows the respondent and complainant the ability to request additional witnesses.[146] A separate Standard Operating Procedure signed by the Superintendent on August 28, 2019, makes it clear that the complainant and respondent are not required to participate in person at the hearing in order for it to proceed and that either party may

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138 *See id.* at 21 ch. 1, para. E.1.j.(4).

139 *See id.* at 17 ch. 1, para. E.1.f.(6).

140 *See id.* at 17 ch. 1, para. E.1.g.(1)(e), 24 para. E.1.l.(1)(a)[3].

141 *See generally* SUPERINTENDENT INSTRUCTION M5215.2N, *supra* note 74 (providing that the Coast Guard Academy only requires a live hearing when an UOTHC characterization is sought, which tends to be the case in sexual misconduct disenrollments).

142 *See* SUPERINTENDENT INSTRUCTION 2018-05, *supra* note 69, at para. 8.b.2 ("[T]he advisor may not speak or otherwise participate in the hearing, may not address the hearing officer(s) or question witnesses."); *see also id.* at para. 8.b.4 ("The Complainant and the Respondent will not be permitted to directly question one another, but may propose questions to the hearing officer(s), who will screen the questions for appropriateness and relevance.").

143 *See generally* U.S. MERCHANT MARINE ACADEMY, SUPERINTENDENT INSTRUCTION 2018-07 (June 27, 2018); SUPERINTENDENT INSTRUCTION 2018-05, *supra* note 69.

144 *See* SUPERINTENDENT INSTRUCTION 2018-05, *supra* note 69, at paras. 7(4), 8(a)(2).

145 *See id.* at para. 8(a)(2). A Superintendent Hearing is disfavored for sexual assault and harassment disenrollment hearings but has been upheld as procedurally sufficient in a recent due process claim. *See id.*; Doe v. U.S. Merch. Marine Acad., 307 F.Supp. 3d 121, 126–27 (E.D.N.Y. 2018).

146 *See* SUPERINTENDENT INSTRUCTION 2018-05, *supra* note 69, at para. 8(a)(5).

request alternative testimony options, such as video teleconferencing, so as not to require physical proximity to the other party.[147] However, the procedures implicitly presume the victim's willingness to participate in the hearing and be subjected to questions by the Board in order to prove the complaint by a preponderance of evidence. No provision explicitly addresses the substitute of written statements, video interviews, or other means of complainant testimony.

Overall, there is no explicit rule in any of the service academies' administrative hearing procedures that states victim in-person cross-examination is required. Instead, mandatory victim cross-examination, modeled after requirements in limited civilian college Title IX cases, has become an *unnecessary* evidentiary prerequisite.[148] While in-person victim cross-examination may be a helpful fact-finding tool, particularly when the assessment of a witness's credibility is essential to fact-finding, there is no rule that requires a live victim's attendance for an administrative discharge to proceed due to administrative allowances for hearsay evidence. A practice that forecloses even attempting to establish sexual misconduct by a preponderance of the evidence unless a victim is willing to submit to cross-examination not only heads off justice in many meritorious sexual misconduct cases with unwilling victims, but also discourages reporting from victims who observe such a loss of agency in the process.

## II. THE RIGHT TO CONFRONT WITNESSES IS NOT REQUIRED IN ADMINISTRATIVE SEXUAL ASSAULT CASES

Military administrative discharge procedures, college disciplinary hearings, and military service academy disenrollment hearings for sexual misconduct do not require special confrontation rights beyond what is extended out of concern for procedural due process for non- sexual administrative disciplinary procedures in the military or educational context. While Title IX's newly codified regulations temporarily sought to levy such a requirement, they were quickly reversed.[149] Additionally,

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147 *See* UNITED STATE MERCHANT MARINE ACADEMY, STANDARD OPERATING PROCEDURE FOR A SUPERINTENDENT'S OR EXECUTIVE BOARD DISCIPLINARY HEARING IN THE CASE OF SEXUAL ASSAULT, SEXUAL OR GENDER-BASED HARASSMENT, RELATIONSHIP VIOLENCE, AND/OR STALKING AT THE UNITED STATE MERCHANT MARINE ACADEMY, para. 6 (Aug. 28, 2019).

148 *See e.g.*, *U.S. Merch. Marine Acad.*, 307 F.Supp. 3d at 121 (demonstrating that mandatory victim cross-examination, was treated as an evidentiary prerequisite by use of written questions in compliance with Academy procedures).

149 *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41505 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106) ("After considering the issue and reweighing the facts and circumstances, including views expressed by a wide array of stakeholders, particularly those with experience in implementing or participating in a recipient's process that included the live hearing and cross-examination requirements, and reviewing the applicable case law and academic writing on the topic of cross-examination and alternatives to cross-examination,

requiring confrontation is contrary to the explicit prefatory language of the Sixth Amendment,[150] is not envisioned by Title IX's statutory mandates,[151] and results in greater harm as a matter of policy. Thus, the persuasive power of Title IX disciplinary procedures on military service academies is diminished. Finally, judicial deference to military procedures is well-established, particularly when military and national security concerns warrant differentiation.

### *A. The Sixth Amendment's Confrontation Clause Is Explicitly Meant for Criminal Cases, Not Administrative Hearings*

The Sixth Amendment to the United States Constitution outlines four criminal trial rights of the accused: trial by jury, trial at the location where the alleged crime was committed, the right to counsel, and notably, the right to cross-examine witnesses.[152] The Sixth Amendment represents one of the cornerstones of American judicial liberties.[153] Amongst this amendment's vital individual safeguards is the Confrontation Clause, which guarantees the accused the "right to be confronted with the witnesses against him."[154] Confrontation of one's accuser, through cross-examination, is a bedrock principle of criminal trials in the United States.[155]

However, despite the power of the Sixth Amendment's Confrontation Clause in protecting the individual rights of the accused, its usefulness is not transferrable to all contexts.[156] The rules of evidence in American criminal trials related to hearsay exceptions demonstrate that even in the criminal context, the Confrontation Clause is *not* absolute.[157] The Supreme Court

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the Department proposes eliminating the requirement for postsecondary institutions to hold a live hearing with advisor-conducted cross examination while still permitting them to hold such a hearing if the postsecondary institution deems it appropriate in a particular sex-based harassment case.").

150 The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

151 *See generally* 20 U.S.C. § 1681 (demonstrating that Title IX's statutory mandates do not include or envision a requirement for confrontation rights like those found in criminal proceedings).

152 *See* U.S. CONST. amend. VI.

153 *See* Johnson v. Zerbst, 304 U.S. 458, 462 (1938) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)) ("The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'").

154 U.S. CONST. amend. VI.

155 *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 42–43, 61–62 (2004); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 317–18 (2009).

156 *See* Johnson v. United States, 628 F.2d 187, 190 (D.C. Cir. 1980) (rejecting an approach that brands evidence unusable because it is hearsay, and explaining "[i]nstead, we evaluate the weight each item of hearsay should receive according to the item's truthfulness, reasonableness, and credibility").

157 *See, e.g.*, Fed. R. Evid. 803 (listing twenty-three exceptions to the rule against hearsay regardless of whether the declarant is available as a witness); Fed. R. Evid. 804(a)–(b) (listing various exceptions to the hearsay exclusion where a declarant is unavailable).

has acknowledged that other means exist to challenge or verify hearsay evidence, and sometimes these ways are better than cross-examination.[158] Additionally, the prefatory wording of the Sixth Amendment—"[i]n all *criminal* prosecutions" (emphasis added)—clearly demonstrates the Confrontation Clause was meant for criminal cases and not guaranteed to respondents in administrative cases.[159] This distinction reflects the fundamental differences between criminal trials and administrative hearings—the stakes, procedural protections, and goals.

American lives are consistently impacted and growingly dominated by the administrative procedures and regulatory rules of executive branch agencies across government, commerce, and employment.[160] From Social Security disability hearings to immigration courts, and professional licensing boards to collegiate disciplinary committees, administrative forums serve vital public functions to adjudicate justice and grievances in efficient and flexible manners.[161] But, their procedural protections afforded to affected citizens fall under Due Process Clause procedural protections, not Sixth Amendment criminal protections. The Supreme Court has repeatedly distinguished the Sixth Amendment and limited the Confrontation Clause to criminal cases, not to the multitude of administrative proceedings that stem from modern bureaucracy.[162]

The Due Process Clause requires a minimum of notice and an opportunity to be heard when the government deprives life, liberty, or

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158 *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 325–26 (2009) (noting that many states already have provisions allowing defendants to assert or forfeit their Confrontation Clause rights and that there is no indication that these provisions impede the criminal justice process).

159 *See* United States v. Zucker, 161 U.S. 475, 481 (1896) ("The Sixth Amendment relates to a prosecution of an accused person which is technically criminal in its nature. . . . A witness who proves facts entitling the plaintiff in a proceeding in a court of the United States, even if the plaintiff be the government, to a judgment for money only, and not to a judgment which directly involves the personal safety of the defendant, is not, within the meaning of the Sixth Amendment. . . . The defendant in such a case is no more entitled to be confronted at the trial with the witnesses of the plaintiff than he would be in a case where the evidence related to a claim for money that could be established without disclosing any facts tending to show the commission of crime.").

160 *See* Osmond K. Fraenkel, *Can the Administrative Process Evade the Sixth Amendment*, 1 SYRACUSE L. REV. 173, 173–74 (1949) ("Yet a situation has developed which, almost unnoticed, has undermined many of these safeguards. More and more aspects of American life have become subject to administrative control.").

161 *See id.* at 174 ("There is no doubt, of course, that the administrative process is a necessary and beneficial part of any highly developed community. There are many aspects of life in which the apparatus of the ordinary courts is too cumbersome and dilatory. . . . Conflict with the safeguards set up in the Sixth Amendment occurs only when criminal sanctions are invoked to enforce the order of the administrative agency. The extent to which such conflict then arises has not been fully recognized by the courts and is not entirely clear from the decisions.").

162 Considering procedural due process, the Supreme Court declined to recognize a right to an opportunity to cross-examine in student postsecondary disciplinary proceedings. *See* Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 86 n.3 (1978).

property interests.[163] But due process is a flexible concept, adaptable to context and the weight of the interests of competing parties.[164] In administrative hearings, the right to confrontation of witnesses and the accuser, essential in a criminal trial, may be counterproductive at an individual case level as well as societal policy level. In the context of sexual assault administrative hearings, whether in the military or educational context, importing a right of witness confrontation is not only counterproductive but catastrophic for individual complainants experiencing the procedures and the societal interest of victims reporting misconduct.

Historically, the Supreme Court has ruled that the Sixth Amendment right to confrontation does not apply in various administrative proceedings.[165] The Supreme Court first addressed the question of whether the Sixth Amendment applied to non-criminal administrative cases in *Hannah v. Larche*.[166] In that case, the Commission on Civil Rights investigated allegations of voting discrimination against African Americans in Louisiana.[167] As part of its investigation the Commission held hearings and subpoenaed witnesses, including Hannah and others, to testify and produce documents.[168] The issue arose whether the procedures used by the Commission in its investigative hearings violated the witnesses' due process rights under the Fifth Amendment and their Sixth Amendment confrontation rights.[169] In response to the Sixth Amendment claim, the Court stated, "[T]heir claim does not merit extensive discussion. That Amendment is specifically limited to 'criminal prosecutions,' and the proceedings of the Commission clearly do not fall within that category . . . ."[170] The Court further explained, "[T]hese agencies are conducting nonadjudicative, factfinding investigations, rights such as apprisal, confrontation, and cross-examination generally do not obtain."[171]

The Court's ruling held that the Commission's administrative rules, which allowed it to deny confrontation and cross-examination did not violate due process. Notably, the Court emphasized that the investigation's function was *purely investigative* per the Commission on Civil Right's

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163 *See* Goss v. Lopez, 419 U.S. 565, 579 (1975) (quoting Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 313 (1950)) ("[M]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

164 *See* Mathews v. Eldridge, 424 U.S. 319, 329 (1976).

165 Hannah v. Larche, 363 U.S. 420, 433 (1960).

166 *See id.*

167 *See id.* at 421–23.

168 *See id.* at 426.

169 *See id.* at 423.

170 *Id.* at 440, n. 16.

171 *Id.* at 446.

mission,[172] *not adjudicative*, and that its proceedings were *not criminal trials* where Sixth Amendment Confrontation and cross-examination rights would apply.[173] In this ruling, the Court gave deference to previously established administrative rules of independent agencies and limited the reach of the Sixth Amendment's bestowing of rights to criminal trials.

The Supreme Court also notably addressed the right to confrontation in administrative proceedings in *Morrissey v. Brewer*.[174] Morrissey and Booher were convicted felons on parole from Iowa prisons. Neither Morrissey nor Booher received a hearing or opportunity to question, challenge, or become aware of the reasons why each man's parole was rescinded.[175] Furthermore, neither man had a chance to present evidence on his behalf or to confront those providing testimony against him.[176] Chief Justice Burger delivered the opinion of the Court, unequivocally declining to extend criminal confrontation rights to the narrow inquiry of administrative parole revocation proceedings.[177] The Court ruled that, while parolees do have conditional liberty interests and have protected due process rights, parole revocation is an *administrative proceeding* and absolute Sixth Amendment confrontation rights do *not* apply.[178] Instead, the Court set the precedent that confrontation and witness cross-examination in administrative hearings are at the discretion of the hearing officer who may deny confrontation if there is good cause.[179]

Deference to the administrative agency to craft rules for administrative hearings is not without limit, however. In *Richardson v. Perales*,[180] an administrative judge denied Jose Perales social security disability benefits. At the hearing, a medical report, supplied by a doctor who had previously examined Perales, was admitted into evidence with the doctor not

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172 *See* 42 U.S.C. § 1975 (2018).

173 *See Hannah*, 363 U.S. at 441 ("[T]he Commission, its function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.").

174 *See* Morrissey v. Brewer, 408 U.S. 471 (1972).

175 *See id.* at 472.

176 *See id.* at 474.

177 *See id.* at 489 ("The right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation) . . . . We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.").

178 *See id.* at 480.

179 *See id.* at 496 (describing the broad discretion of parole boards in formulating and imposing parole conditions in order to cover any contingency that might occur and are designed to maximize control over the parolee by his parole officer).

180 *See* Richardson v. Perales, 402 U.S. 389 (1971).

testifying in person.[181] Perales challenged consideration of the report.[182] The Court ruled that the hearsay evidence of the non-testifying doctor's reports was admissible in an administrative hearing deferring authority to the Administrative Procedure Act[183] which states "any oral or documentary evidence may be received."[184] This case exemplifies Supreme Court deference to pre-established administrative procedures, allowing for agencies to outline their own rules for including and excluding aspects of criminal trials—in this case, cross-examination and admittance of hearsay evidence—as long as such rules comply with statutory limits.

The Supreme Court recently overturned *Chevron v. Natural Resources Defense Council*, upending judicial deference to administrative regulators.[185] The Court rejected the idea that statutory ambiguity necessarily implies a congressional intent to delegate interpretive authority to agencies.[186] The new Court decision holds that courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority.[187] Regardless, when statutory delegation of authority to an agency is consistent with constitutional limits, courts must respect it—the role of the judiciary being to ensure agencies act within constitutional requirements.[188]

While a landmark decision, the Court's decision in *Loper Bright* can be separated from the aforementioned cases that display the Court's deference towards administrative agencies, especially when statues are not ambiguous but merely silent, as in the case of specific procedures for school disciplinary hearings. *Loper Bright* clarifies that courts may not defer to an agency's interpretation based on a statute's ambiguous nature.[189] It does not require courts to disagree with administrative decisions when the statute and administrative authority's decision is consistent with constitutional requirements. In fact, it recommends that courts respect the delegation to the administrative authority's decision.[190] In the Title IX context, the Supreme Court previously gave wide latitude to the Department of Education to "promulgate and enforce requirements that effectuate the statute's non-discrimination mandate."[191]

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181 *See id.* at 390.

182 *See id.* at 397.

183 *See* Administrative Procedure Act, 5 U.S.C. § 556(d) (1964 ed., Supp. V).

184 5 USCS § 556(d) (1966 ed., Supp. V).

185 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

186 *See id.* at 2252 ("*Chevron* has proved to be fundamentally misguided.").

187 *See id.* at 2262.

188 *See id.* at 2273.

189 *See id*. ("Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry.").

190 *See id.* at 2273 ("When a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it.").

191 Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292 (1998).

### *B. Victim Confrontation is Not Required by Title IX or the Constitution*

In a small number of Title IX responsibility-finding sexual misconduct appeals, judges have determined that confrontation of a victim is required to make a credibility determination.[192] These cases have important limiting conditions that relegate their precedential value to decisions based on arbitrariness rather than a sweeping proclamation that victims must be subjected to cross-examination in all Title IX cases.[193]

Title IX outlines the minimum requirements that postsecondary schools must follow in responding to sexual assault cases on collegiate campuses.[194] Schools are permitted to take additional actions to support survivors, persecute offenders, and deter future cases, while meeting obligations imposed under Title IX regulations.[195] Based on Title IX guidance, colleges in sexual assault disciplinary hearings must adopt at least a "preponderance of the evidence" standard, typical of most administrative processes, and do not use the "beyond a reasonable doubt" standard used in criminal trials.[196] Furthermore, Title IX requires certain procedural protections for both complainants and respondents.

Whether a college or university extends a right for respondents' advisor to cross-examine witnesses in formal disciplinary hearings is largely left up to the school's discretion considering judicial oversight. The question is ultimately guided by a case-by-case weighing of the respondent's interests against the public interest, implementing the *Mathews* balancing test from *Mathews v. Eldridge*.[197] More specifically, the respondent's interests at stake include completing their education and avoiding unfair or mistaken exclusion from school, as well as stigma that may follow them.[198] College and university interests include protecting itself and other students from offenders whose behavior violates school values, balancing the need for fair discipline against the need to allocate resources toward education, and encouraging students to report sexual misconduct as well as witnesses to participate in the process.[199]

Colleges and universities must also be careful to consistently follow their own established procedures in striking the right due process balance. While the outcome of the balancing depends heavily on the extent to which the case turns on assessing credibility and the nature of the evidence,

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192 *See* Doe v. Baum, 903 F.3d 575, 578 (6th Cir. 2018); Doe v. Univ. of Cincinnati, 872 F.3d 393, 396 (6th Cir. 2017).

193 *See Baum*, 903 F.3d at 578; *Univ. of Cincinnati*, 872 F.3d at 396.

194 *See* 20 U.S.C.S. § 1681(a).

195 *See* Q&A FROM OFFICE OF CIVIL RIGHTS, *supra* note 53 (answering what procedural requirements are required of universities receiving federal funding).

196 34 CFR § 106.45(b)(1)(vii) (2024).

197 *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

198 *See* Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 66 (1st Cir. 2019).

199 See *id.*; Boermeester v. Carry, 15 Cal. 5th 72, 93 (Cal. 2023).

schools are beholden to follow their own procedural design as well. This leads to an over-extension of procedural protection to the respondent to hedge against insufficient safeguards in a small proportion of cases.[200] For example, colleges and universities in the Sixth Circuit might require a respondent's advisor opportunity to cross-examine the accuser in Title IX disciplinary hearings for all sexual assault and harassment because of two previous major Circuit Court decisions of *Doe v. Baum*[201] and *Doe v. University of Cincinnati*[202] finding cross-examination necessary in limited cases. In these two decisions, the Sixth Circuit held that cross-examination of the accuser is a due process requirement in cases when credibility is at issue and consequences are severe for the accused—two conditions that are easy to justify in most, if not all, sexual misconduct cases.[203]

In *Doe v. University of Cincinnati*, the victim failed to appear at the hearing. Nonetheless, the university found John Doe "'responsible' for sexually assaulting Roe based upon her previous hearsay statements to investigators."[204] The plaintiff appealed his suspension on the basis that the denial of his right to confront his accuser violated his due process right to a fair hearing. In the Sixth Circuit's decision, the court emphasized the importance of accuser confrontation in cases with conflicting accounts.[205] Given the severer consequences for Doe, the University of Cincinnati's failure to allow any cross-examination of Roe resulted in a denial of due process. However, while the court held that the university violated Doe's due process rights, it illustrated that accuser confrontation and cross-examination is not an absolute obligation of the university, stating, "We emphasize that UC's obligations here are narrow: it must provide a means for the ARC panel to evaluate an alleged victim's credibility, not for the accused to physically confront his accuser."[206]

The decision in *Doe v. University of Cincinnati* has been misused to broadly support the absolute right of accuser confrontation in collegiate Title IX administrative cases by supporters of the concept, but the case hardly stood for such a sweeping rule.[207] The case is confined to formal grievances in which the credibility of *both* parties is at issue (in other words, the respondent makes a statement), the accounts are materially different, and the decisionmaker cannot assess credibility by means other

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200 *See* 87 Fed. Reg. 41505 (2022) (noting that the Department of Education, in proposing revised rules for postsecondary education hearings, acknowledged that a flexible approach allowing colleges and universities to choose whether to conduct hearings with live advisor-mandates while balancing the plenary interests of schools, victims, and respondents).

201 *See* Doe v. Baum, 903 F.3d 575, 578 (6th Cir. 2018).

202 *See* Doe v. Univ. of Cincinnati, 872 F.3d 393, 396 (6th Cir. 2017).

203 *See id.*; Doe v. Haas, 427 F.Supp. 3d 336, 351 (E.D.N.Y. 2019).

204 *See Univ. of Cincinnati*, 872 F.3d.

205 *See id.* at 400–02.

206 *Id.* at 406.

207 *See* Doe v. Baum, 903 F.3d 575, 583 (6th Cir. 2018).

than cross-examination.[208] These circumstances are much narrower than the oversimplified narrative that live cross-examination is necessary whenever credibility is at issue.

The Court's decision in *Doe v. Baum*[209] extends the Sixth Circuit's precedent from the *University of Cincinnati* decision. In *Doe v. Baum*, the Sixth Circuit reversed the district court's dismissal of Doe's due process and Title IX violation claims against the University of Michigan.[210] Doe alleged that the university violated his due process rights by not allowing him to cross-examine his accuser and adverse witnesses.[211] In this instance, the Court held that in cases where credibility is an issue, such as disconfirming witness accounts, the university must allow for cross-examination of the accuser and adverse witnesses.[212] This time, the court emphasized the stakes in reputation and livelihood of the accused as rationale for its decision.[213] Like the decision in *University of Cincinnati*, the Sixth Circuit emphasized the non-absolute right of accuser cross-examination. "That is not to say, however, that the accused student always has a right to personally confront his accuser and other witnesses."[214]

The court's decisions in *Doe v. University of Cincinnati* and subsequently *Doe v. Baum* have had major implications for how universities handle Title IX sexual misconduct cases, particularly in the Sixth Circuit. Both cases hold that a university must provide a hearing where the accused can cross-examine the accuser and adverse witnesses in cases where "credibility is at issue," which is arguably most if not all sexual misconduct cases. Additionally, the underlying rationale of severe consequences for a respondent is also present in almost all sexual misconduct administrative cases. Thus, while both cases overturned

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208 *See Univ. of Cincinnati*, 872 F.3d at 401–02 (quoting Doe v. Brandeis Univ., 177 F.Supp. 3d 561, 605 (D. Mass. 2016)) ("The ability to cross-examine is most critical when the issue is the credibility of the accuser.").

209 *See Baum*, 903 F.3d at 578.

210 *See id*.

211 *See id*. at 580.

212 *See Univ. of Cincinnati*, 872 F.3d at 402 (citations omitted) ("Given the parties' competing claims, and the lack of corroborative evidence to support or refute Roe's allegations, the present case left the ARC panel with 'a choice between believing an accuser and an accused.' Yet, the panel resolved this 'problem of credibility' without assessing Roe's credibility. In fact, it decided plaintiff's fate without seeing or hearing from Roe at all. That is disturbing and, in this case, a denial of due process.").

213 *Id.* at 406–07 ("Here, John Doe's private interest is substantial, and the risk of erroneous deprivation under the procedures UC followed at his ARC hearing is unacceptably high. Allowing defendants to pose questions to witnesses at certain disciplinary hearings may impose an administrative burden on UC. Yet on the facts here, that burden does not justify imposition of severe discipline without any credibility assessment of the accusing student.").

214 *Baum*, 903 F.3d at 583 (quoting Doe v. Miami Univ., 882 F.3d 579 (6th Cir. 2018)) ("[N]oting that "even in the face of a sexual-assault accusation," the protections afforded to an accused 'need not reach the same level . . . that would be present in a criminal prosecution.'").

arbitrary credibility determinations, in effect the precedent seems far broader in its reach and difficult to implement on a case-by-case basis.

Despite the effect of prompting many postsecondary schools to extend cross-examination in an aversion to risk, both the *Baum* and *University of Cincinnati* courts made special note to emphasize that accuser cross-examination was not an absolute right or obligation that must be offered by universities. In *Doe v. University of Cincinnati*, the Sixth Circuit admitted that the obligation of the University of Cincinnati was to provide a means to evaluate an alleged victim's credibility, "not for the accused to physically confront his accuser."[215] In *Doe v. Baum*, the Circuit more explicitly noted that it was not claiming that an accused student always has the right to confront his accuser and other witnesses. In both cases, the Circuit did not address other ways that credibility could be assessed short of cross-examination. Additionally, in *Doe v. University of Cincinnati,* the court objected to the University of Cincinnati's "departure from its own hearing rules" which previously included the right to accuser cross-examination.[216] In *Doe v. Baum*, the court challenged the University of Michigan's acceptance of Baum's sorority sisters' testimonies and not Doe's fraternity brothers' testimonies, with an underlying tone of arbitrariness to the credibility determination.

To interpret these cases broadly and extend them to all university grievance cases represents a gross overstep in interpretation of procedural due process and the Sixth Amendment's Confrontation Clause; such an interpretation is a departure from traditional court deference to pre-established administrative proceedings. Furthermore, it represents bad public policy. Conducting hearings with full Sixth Amendment confrontation and cross-examination not only deters complainants but also requires significant resources, personnel, and training to be conducted fairly and respect victim's rights, transforming these types of hearings on collegiate campuses into evidentiary trials. Such an interpretation also makes Title IX disciplinary hearings more costly, complicated, and time consuming, without necessarily increasing the fairness of outcomes, given there are alternatives to assessing credibility. For example, statements made under oath to investigators, or statements made to others prior to the development of a motive to fabricate, or statements corroborated by other evidence, or witnesses all enable decisionmakers to weigh the reliability of statements. Notably, while outcry statements were numerous in the *Cincinnati* case, the court did not address them in their analysis in finding a baseless credibility determination.

More importantly, Title IX disciplinary hearings and other administrative cases addressing sexual assault do not involve a criminal

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215 *Id.* at 578; s*ee Univ. of Cincinnati*, 872 F.3d at 401–02.

216 *Id.* at 407.

prosecution but rather entail determinations over whether a student violated university policy. While the stakes, which include reputation and livelihood, are significant, they do not involve criminal penalties like incarceration. Courts have long held that the full umbrella of rights offered to a criminal defendant need not *and do not* apply in administrative proceedings.[217]

The Sixth Circuit's decision in requiring confrontation of the accuser represents an overstep departing from traditional understandings of administrative proceedings. As illustrated in cases like *Hannah v. Larche*,[218] *Morrissey v. Brewer*,[219] and *Richardson v. Perales*,[220] the Supreme Court has consistently deferred to pre-established rules and policies of an agency. Like cases addressing sexual assault accusations, the stakes of these cases were high. They respectively involved credibility and reputation, personal freedom from incarceration, and livelihood. More recent lower court decisions, regarding specifically sexual assault accusations, in *University of Cincinnati* and *Baum* represent a new trend of judicial overreach, transforming the role of administrative processes in settling administrative questions, such as continued enrollment and employment. In essence, while accused students certainly have a vital interest in a fair process, importing the Sixth Amendment into the university disciplinary context is not required nor advisable. Given alternative measures to avoid erroneous outcomes, universities can ensure fair hearings without strict confrontation rules of the accuser. Most importantly, administrative agencies, especially colleges and universities, have a responsibility to their student populations to provide fair and effective avenues for reporting sexual offenses. In a context where the Sixth Amendment's Confrontation Clause is irrelevant, current practices and university policies that require strict confrontation deter individuals from bringing meritorious claims to the attention of the decisionmaker. Finally, while postsecondary educational institutions can certainly be sued by a complainant or offender for damages if the institution fails to follow Title IX or constitutional mandates,[221] the standard plaintiffs must meet to succeed on such claims was sharply raised by the Supreme Court in the late 1990s, significantly reducing schools'

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217 *See* Hannah v. Larche, 363 U.S at 442 (1960) ("However, when these agencies are conducting non-adjudicative, fact-finding investigations rights such as appraisal, confrontation, and cross-examination generally do not obtain.").

218 *See id.*

219 *See* Morrissey v. Brewer, 408 U.S. 471, 480 (1972) ("We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations.").

220 *See* Richardson v. Perales, 402 U.S. 389, 400 (1971) ("This, we think, is as it should be, for this administrative procedure, and these hearings, should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation. This is the obvious intent of Congress so long as the procedures are fundamentally fair.").

221 *See* Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 76 (1992).

risk of liability.[222] Thus, colleges and universities should not jump to apply strict confrontation rules across all contexts out of fear of litigation.

### *C. Military Academy Disenrollments Do Not Require Victim Confrontation*

Military service academies' due process procedures for sexual misconduct involuntary discharges are subject to challenge in federal court.[223] These include constitutional challenges.[224] Thus, the academies are prudent to be mindful of colorable claims and litigation risk, particularly where regulatory and judicial findings trend toward granting greater rights and protections in corollary contexts such as postsecondary education. However, such prudence does not mean that academies should extend *de facto* confrontation rights to respondents in all sexual misconduct cases for the reasons discussed in Part II *supra*.

#### 1. Due Process Clause Balancing Does Not Demand Criminal Confrontation Protections

Students accused of sexual violence under Title IX have taken to the courts in mass to challenge due process and fairness in their institutions' sexual misconduct disciplinary procedures.[225] Courts apply the *Mathews v.*

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222 *See* Victim Rights Law Ctr. v. Cardona, 552 F.Supp. 3d 104, 116 (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999)) ("A plaintiff may recover 'only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit,' and he or she must prove the school's 'deliberate indifference to known acts of harassment in its programs or activities.'"). The court further stated that the standard is met only if an official with authority to address discrimination has actual knowledge of the discrimination and fails to adequately respond, a combined threshold known as the "Gebser/Davis framework." *Id*.

223 *See* Holley v. United States, 124 F.3d 1462, 1465–66 (Fed. Cir. 1997) ("[C]laims asserting wrongful military discharge have arisen in a variety of factual and legal situations. Some have been based on violations of statute, some on non-compliance with regulations, and some have raised constitutional issues."). In *Sanders v. United States*, the Court of Claims held that when an Officer Evaluation Report was not prepared in accordance with regulation, a discharge based thereon was subject to remedy. *See* 594 F.2d 804, 810–11 (Ct. Cl. 1979). Wrongful discharge as a constitutional violation was reviewed in *Woodward v. United States*. 871 F.2d 1068, 1073 (Fed. Cir. 1989). Similarly, review for a constitutional violation may occur "even where agency action is 'committed to agency discretion by law.'" Padula v. Webster, 365, 822 F.2d 97, 101 (D.C. Cir. 1987). *See also* Koster v. United States, 685 F.2d 407, 412 (Ct. Cl. 1982); Adkins v. United States, 68 F.3d 1317, 1321 (Fed. Cir. 1995); Sargisson v. United States, 913 F.2d 918, 920 (Fed. Cir. 1990); Skinner v. United State*s*, 594 F.2d 824, 831 (Ct. Cl. 1979). Additionally, "[m]en and women in the Armed forces do not leave constitutional safeguards and judicial protection behind when they enter military service." Weiss v. United States, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring); Chappell v. Wallace, 462 U.S. 296, 304 (1983) (holding that military personnel retain basic constitutional rights).

224 *See Holley*, 124 F.3d at 1467 ("Indeed, a procedural violation asserted to be of constitutional dimension is of particular judicial concern.").

225 *See* Sage Carson & Sarah Nesbitt, *Balancing the Scales: Student Survivors' Interest and the Mathews Analysis*, 43 HARV. J.L. & GENDER 319 (2020) ("[As of 2020], respondents have filed over 500 [such] due process claims.").

*Eldridge* balancing test to such claims, which some argue is an erroneous framework in the Title IX context because it only balances the interests of two parties: the respondent whose liberty or property interests were deprived, and the public interests of the depriver.[226] However, the *Mathews* balancing framework endures as the prevailing test of constitutionality. At its core, *Mathews* requires that the government extend enough procedural due process to account for the nature of the private interest at stake in light of the function and cost to the government of extending more procedural safeguards.[227]

The strength of the private liberty interest affected is important in weighing the specific due process procedures required by the Constitution. Service academy sexual assault cases ending in administrative discipline proceedings would normally demand a recommendation of an "under other than honorable" characterization of service, thus providing a stigma triggering a due process evidentiary hearing.[228] However, the resulting stigma does not warrant procedural rights beyond a full evidentiary hearing commensurate with criminal trials.[229] Numerous federal courts have found as such.[230]

When an action is stigmatizing, there is an enhanced right to a hearing.[231] While it is true that the more serious the private deprivation and stigma, the more demanding the due process,[232] without an additional deprivation such as sex offender registry, very little additional deprivation attaches due to the underlying misconduct being sexual in nature.[233]

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226 *See id.*

227 *See* Mathews v. Eldridge, 424 U.S. 319, 342–43 (1976) (holding that a factor to be considered in determining whether administrative procedures comport with due process is "the fairness and reliability of the existing procedures, and the probable value, if any, of additional procedural safeguards").

228 Alam v. United States, 592 F.Supp. 3d 810, 822 (2022).

229 *See* Milas v. United States, 42 Fed. Cl. 704, 712 (1999).

230 *See*, *e.g.*, Butler v. Rector & Bd. of Visitors of Coll. of William & Mary, 121 F. App'x 515, 520 (4th Cir. 2005) (finding "no basis in the law" to import the right to cross-examine witnesses into the academic context); Gorman v. Univ. of Rhode Island, 837 F.2d 7, 16 (1st Cir. 1988) (holding that the right to unlimited cross-examination is not "an essential requirement of due process in school disciplinary cases"); Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987) (finding that the inability to question adverse witnesses in the usual, adversarial manner did not result in a denial of appellants' constitutional rights to due process).

231 *See* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (holding that when a person's "good name, reputation, honor or integrity [are] at stake because of what the government is doing to him, notice and an opportunity to be heard are essential").

232 See Doe v. Univ. of Cincinnati, 872 F.3d 393, 400 (6th Cir. 2017) ("The more serious the deprivation, the more demanding the process.").

233 Courts have not differentiated the social stigma stemming from sexual misconduct as so different in nature and character from more general misconduct that it deserves heightened procedural protection beyond general misconduct, all other factors being equal. *See*, *e.g.*, Doe v. Brandeis Univ., 177 F.Supp. 3d 561, 602 (D. Mass. 2016) (holding that a "student who is found responsible for sexual misconduct will likely face substantial social and personal repercussions" but failing to differentiate those repercussions from general misconduct disenrollment); Doe v.

Any additional safeguards that may be provided certainly do not rise to the level of criminal confrontation.

For military cadets disenrolled for sexual misconduct, the most significant additional stigma beyond non-sexual misconduct disenrollments is the cadet's ability to enroll at another college or university following their disenrollment.[234] As there is no categorial ban among postsecondary institutions to deny applicants disenrolled for sexual harassment or assault—it is merely a matter of discretion—no entitlement for additional procedural safeguards should attach beyond what attaches for other misconduct disenrollments. Discharge proceedings are not open to the public.[235] Public disclosure occurs only by the respondent sharing official military documentation.

A military discharge for sexual assault is publicly characterized by the "reason code" on the Department of Defense Form 214. Additionally, for military academy cadets and midshipmen, a "record of disenrollment form officer candidate-type training" (Department of Defense Form 785) is prepared and shared with other officer training programs such as the Reserve Officer Training Corps (ROTC) program. All other documents, such as the written notice of discharge proceedings, reports to the Superintendent or Show Cause Authority, and evidence submitted to the board or decision authority are internal to the military. This means that sexual assault or harassment administrative discharges carry no additional concern for the respondent's private interests than misconduct generally unless some special stigma attaches for sexual misconduct specifically by society. Limited disclosure of the underlying nature of the discharge as sexual misconduct provides no additional due process mandate beyond that applicable to misconduct disenrollments generally.

### 2. Well-Established Military Deference Permits Greater Due Process Latitude Than Title IX

Military academies have the latitude to deviate significantly from due process requirements that would be appropriate in civilian contexts. The military enjoys long-standing judicial deference toward military administrative procedures and decision-making.[236] It is a well- established principle that the judicial branch accords deferential constitutional review of discretionary acts of military officials due to "a respect for duty and

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Rector & Visitors of George Mason Univ., 149 F.Supp. 3d 602, 613 (E.D. Va. 2016) (citations omitted) (noting that a charge of sexual misconduct "plainly calls into question plaintiff's 'good name, reputation, honor, or integrity'" but failing to distinguish such calling into question from that which occurs with other non-sexual offenses such as academic integrity violations).

234 *See* Boermeester v. Carry, 15 Cal. 5th 72, 89 (Cal. 2023).

235 *See* Discharge Review Board Procedures and Standards, 32 C.F.R. § 70.8 (2024).

236 *See* Orloff v. Willoughby, 345 U.S. 83, 94 (1953); Rostker v. Goldberg, 453 U.S. 57, 65 (1981).

discipline" different from civilian life.[237] When courts evaluate challenges to military actions, "judicial deference is at its apogee."[238] "Complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments."[239]

There is a difference, however, between the strong level of deference for military decision-making, particularly on matters of national security, and the review courts give of military compliance with law, namely the Constitution and applicable statutory parameters.[240] Military discharge procedure is not an issue of achieving legitimate military ends, for which deference to discretion would most strongly attach, but rather a matter of compliance with law, a "judicial responsibility."[241] But even in exercising this judicial responsibility, judges have extended deference to military officials' decisions regarding discharge of servicemembers and disenrollment of military academy cadets as long they comply with minimal procedural due process.[242] Decisions regarding who will serve in the military and at what point they will no longer be able to serve is deserving of "great discretion."[243] This deference extends into procedures to end one's military service, so long as they comply with minimum constitutional parameters.

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[237] *See* Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (quoting Schlesinger v. Councilman, 420 U.S. 738, 757 (1975). Additionally, '"orderly government requires us to tread lightly on the military domain, with scrupulous regard for the power and authority of the military establishment to govern its own affairs within the broad confines of constitutional due process' . . . [e]ven particularly 'severe' penalties may be appropriate in the military context." Doolen v. Wormuth, 5 F.4th 125, 136 (2d Cir. 2021) (citing Hagopian v. Knowlton, 470 F.2d 201, 208 (2d Cir. 1972); Andrews v. Knowlton, 509 F.2d 898, 908 (2d Cir. 1975)).

[238] Richenberg v. Perry, 97 F.3d 256, 261 (8th Cir. 1996) (upholding the military's policies and procedures related to "Don't Ask, Don't Tell" statutory guidance).

[239] *Id.*

[240] *See* Doolen v. Wormuth, 5 F.4th 125, 132–33 (2d Cir. 2021) (citations omitted) ("'[F]ederal courts will not normally review purely discretionary decisions by military officials which are within their valid jurisdiction." Nevertheless, 'non-justiciability of discretionary military decisions is not absolute.' Two major exceptions to the intra-military immunity doctrine exist. First, we review facial challenges to the constitutionality of military regulation. Second, we review claims that 'the military has failed to follow its own mandatory regulations in a manner substantially prejudicing a service member.'").

[241] *Holley*, 124 F.3d at 1467–68 (citing Goldman v. Weinberger, 475 U.S. 503 (1986); Weinberger v. Salfi, 422 U.S. 749, 762 (1975)).

[242] *See* N.B. v. United States, 552 F.Supp. 3d 387, 400 (E.D.N.Y. 2021) (quoting Andrews v. Knowlton, 509 F.2d 898, 904–05 (2d Cir. 1975) ("Because '[f]ew decisions properly rest so exclusively within the discretion of the appropriate government officials [as] the selection training, discipline and dismissal of the future officers of the military and Merchant Marine,' a disciplinary proceeding conducted 'within these bounds of procedural due process would be proper and immune from constitutional infirmity.'").

[243] Cole v. United States, 52 Fed. Cl. 429, 431 (2002) (citing Murphy v. United States, 993 F.2d 871 (Fed. Cir. 1993); Orloff v. Willoughby, 345 U.S. 83, 87 (1953)).

An examination of procedural due process takes into consideration the unique requirements of military schools.[244] The unique requirements of military schools include using "rigorous and exacting standards" as part of a training program designed to produce career officers able to "provide military leadership under stress, imbued with courage, a strong sense of duty, and a willingness to subordinate personal self-interest to the overriding needs of their country."[245] Additionally, the private interests of service academy cadets and midshipmen are explicitly less weighty in due process balancing than those of civilian public university students.[246]

Thus, procedures guaranteeing an opportunity to be heard without attorney representation and without a right to directly question a complaining witness, such as those at the Naval Academy and the Military Academy, meet minimum constitutional requirements in balancing the interests of the respondent with those of the military institution. Similarly, an Air Force Academy full evidentiary hearing when faced with a stigma-attaching service characterization, even if unable to question the complaining witness, would survive procedural due process challenges in court. To extend a Sixth Amendment right to confrontation to military administrative hearings would make little sense considering the Supreme Court's unwillingness to extend the Sixth Amendment right to a jury trial into the military's criminal justice system.[203] Therefore, if all of higher education adopted the Sixth Circuit's outlier interpretation of constitutional due process requiring live victim cross- examination when a credibility determination is required, the military academies would be well- positioned to deviate from this requirement.

## Conclusion

While many improvements have been implemented in recent years at the service academies, focused on responding to and deterring sexual assault, rates of sexual violence at all the service academies remains high. Current practices that require live victim testimony and live victim cross-examination in all administrative sexual misconduct disenrollment

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244 See Doe v. U.S. Merch. Marine Acad., 307 F.Supp. 3d 121, 150, 154 (E.D.N.Y. 2018) (explaining that the right to cross-examine witnesses is not considered an essential requirement of due process in Merchant Marine Academy disciplinary proceedings); Crowley v. U.S. Merch. Marine Acad., 985 F.Supp. 292, 297 (E.D.N.Y. 1997) ("[C]ourts generally have declined to recognize a right to representation by counsel, as a function of due process, in military academy disciplinary proceedings concerning non-criminal acts."); Doolen v. Wormuth, 5 F.4th 125, 134 (2d Cir. 2021) (citing Hagopian v. Knowlton, 470 F.2d 201, 208 (2d Cir. 1972)) ("[T]he military has a very strong interest in 'govern[ing] its own affairs' and determining who would best meet uniquely important standards of conduct and discipline.").

245 *Hagopian*, 470 F.2d at 204.

246 *See id.* at 210 ("[T]he student voluntarily at a military academy must be prepared to subordinate his private interests to the proper functioning of the educational institution he attends to a greater degree than the student at a civilian public school.").

cases constitute an unadvisable, risk-averse practice. As hybrids between the military and civilian colleges, military service academies have an important responsibility to fairly and effectively address sexual misconduct allegations. Mishandling of response to sexual assault cases by any institution responsible for the safety and development of its members erodes trust in the institution and potentially exposes members to unnecessary harm and trauma. Resultingly, it is critical for service academies to implement policies that do not deter victims from reporting sexual misconduct, nor witnesses faced with the dilemma of reporting on the behalf of victims afraid to speak up.

Requiring by default live victim testimony and cross-examination for cadet or midshipman disenrollment in sexual misconduct cases is not only unnecessary, but counterproductive to the goal of reducing sexual violence prevalence at these institutions. Constitutional and statutory frameworks governing service academy hearings on sexual misconduct unequivocally do not require live victim testimony to satisfy procedural due process. Overall, this practice by the service academies represents an overextension of due process rights availed to offenders since administrative hearings are not criminal trials and should not include the constitutional right to confrontation. By reconsidering this practice and articulating in administrative law the right of complaining witnesses and crime victims not to testify, service academies can better balance the rights of the accused with their delegated responsibility to protect victims and encourage reporting. In the future, it is paramount for each of the service academies to reexamine victim cross-examination practices to ultimately fulfill their mission of military leader development in an environment that appropriately addresses and prevents sexual violence and harassment.